

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1957

No. 103

CITY OF CHICAGO, A MUNICIPAL
CORPORATION, PETITIONER,

vs.

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY
COMPANY; THE BALTIMORE AND OHIO
RAILWAY COMPANY; ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 104

PARMELEE TRANSPORTATION CO.
ET AL., APPELLANTS,

vs.

THE ATCHISON, TOPEKA AND SANTA FE
RAILWAY CO., ET AL.

APPEAL FROM THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

NO. 103, PETITION FOR CERTIORARI FILED APRIL 11, 1957

CERTIORARI GRANTED MAY 27, 1957

NO. 104, FILED APRIL 12, 1957

JURISDICTION POSTPONED MAY 27, 1957

In the
United States Court of Appeals

For the Seventh Circuit

No. 11692

**THE ATCHISON, TOPERA AND SANTA FE RAIL-
WAY CO., ET AL.,**

Plaintiffs-Appellants,

vs.

THE CITY OF CHICAGO, ET AL.,

Defendants-Appellees,

AND

PARMELEE TRANSPORTATION CO.,

Defendant-Intervenor-Appellee.

Appeal from the United States District Court for the
Northern District of Illinois, Eastern Division.

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1 IN THE UNITED STATES DISTRICT COURT
For the Northern District of Illinois,
Eastern Division.

The Atchison, Topeka and Santa Fe
Railway Company, *et al.*
Plaintiffs-Appellants,

vs.

City of Chicago, a Municipal corpo-
ration, *et al.*,
Defendants-Appellees,
and

Parmelee Transportation Company,
Defendant-Intervenor-Appellee.

Civil Action
No. 55 C 1883.

STATEMENT REQUIRED BY RULE NO. 10(b) OF
THE RULES OF THE UNITED STATES COURT OF
APPEALS FOR THE SEVENTH CIRCUIT.

Time of Commencement of the Action.

The action was commenced on October 24, 1955.

Names of the Parties.

Plaintiffs-Appellants:

The Atchison, Topeka and Santa Fe Railway Company
The Baltimore and Ohio Railroad Company
The Chesapeake and Ohio Railway Company
Chicago & Eastern Illinois Railroad Company
Chicago and North Western Railway Company
Chicago, Burlington & Quincy Railroad Company
Chicago Great Western Railway Company
Chicago, Indianapolis and Louisville Railway Company
Chicago, Milwaukee, St. Paul and Pacific Railroad
Company
Chicago, North Shore and Milwaukee Railway
Chicago, Rock Island and Pacific Railroad Company
Chicago South Shore and South Bend Railroad
Erie Railroad Company
Grand Trunk Western Railroad Company
2 Gulf, Mobile and Ohio Railroad Company
Illinois Central Railroad Company
Minneapolis, St. Paul & Sault Ste. Marie Railroad Com-
pany

The New York Central Railroad Company
 The New York, Chicago and St. Louis Railroad Company
 The Pennsylvania Railroad Company
 Wabash Railroad Company
 and Railroad Transfer Service, Inc., corporations.

Defendants-Appellees:

City of Chicago, a municipal corporation
 Richard J. Daley, not individually but as Mayor of said city
 John C. Melaniphy, not individually but as Acting Corporation Counsel of said city
 Timothy P. O'Connor, not individually but as Commissioner of Police of said city
 William P. Flynn, not individually but as Public License Commissioner of said city.

Defendant-Intervenor-Appellee:

Parmelee Transportation Company.

Dates of Filing Pleadings.

Plaintiffs' Complaint filed October 24, 1955.

Plaintiffs' motion for temporary restraining order filed October 24, 1955.

Motion of Parmelee Transportation Company to intervene as a defendant filed October 27, 1955.

Petition of Parmelee Transportation Company to intervene as a defendant filed October 27, 1955.

Motion of all defendants (except defendant-intervenor Parmelee Transportation Company) for summary judgment filed November 17, 1955.

Time When the Trial Was Had.

Hearings were held before the Court on October 28, 1955, and on November 10 and 17, 1955.

Name of Trial Judge.

Honorable Walter J. LaBuy.

Date of Final Judgment.

Final judgment was entered January 12, 1956, dismissing complaint and dissolving temporary restraining order.

Date Appeal Was Taken.

Notice of appeal was filed January 13, 1956.

4 Pleas had at a regular term of the United States District Court for the Eastern Division of the Northern District of Illinois begun and held in the United States Court Rooms in the City of Chicago in the Division and District aforesaid on the first Monday of January, it being the 2nd day thereof) in the Year of Our Lord One Thousand Nine Hundred Fifty-Six and of the Independence of the United States of America, the 180th Year.

Present:

Honorable John P. Barnes, Chief District Judge.
Honorable William H. Holly, District Judge.
Honorable Philip L. Sullivan, District Judge.
Honorable Michael L. Igoe, District Judge.
Honorable William J. Campbell, District Judge.
Honorable Walter J. LaBuy, District Judge.
Honorable J. Sam Perry, District Judge.
Honorable Win G. Knoch, District Judge.
Honorable Julius J. Hoffman, District Judge.
Roy H. Johnson, Clerk.
William W. Kipp, Sr., Marshal.

Thursday, January 12, 1956.

Court met pursuant to adjournment.

Present: Honorable Walter J. LaBuy, Trial Judge.

IN THE UNITED STATES DISTRICT COURT
For the Northern District of Illinois,
Eastern Division.

The Atchison, Topeka and Santa Fe Railway Company; The Baltimore and Ohio Railroad Company; The Chesapeake and Ohio Railway Company; Chicago & Eastern Illinois Railroad Company; Chicago and North Western Railway Company; Chicago, Burlington & Quincy Railroad Company; Chicago Great Western Railway Company; Chicago, Indianapolis and Louisville Railway Company; Chicago, Milwaukee, St. Paul and Pacific Railroad Company; Chicago North Shore and Milwaukee Railway; Chicago, Rock Island and Pacific Railroad Company; Chicago South Shore and South Bend Railroad; Erie Railroad Company; Grand Trunk Western Railroad Company; Gulf, Mobile and Ohio Railroad Company; Illinois Central Railroad Company; Minneapolis, St. Paul & Sault Ste. Marie Railroad Company; The New York Central Railroad Company; The New York, Chicago and St. Louis Railroad Company; The Pennsylvania Railroad Company; Wabash Railroad Company; and Railroad Transfer Service, Inc., corporations,

No. 55 C 1883.

Plaintiffs,

vs.

City of Chicago, a municipal corporation; Richard J. Daley, not individually but as Mayor of said city; John C. Melaniphy, not individually but as Acting Corporation Counsel of said city; Timothy P. O'Connor, not individually but as Commissioner of Police of said city, and William P. Flynn, not individually but as Public License Commissioner of said city,

Defendants.

Be It Remembered, that, on to-wit, the 24th day of October, 1955, the above-entitled action was commenced by the filing of a Complaint, in the office of the Clerk of the United States District Court for the Northern District of Illinois, Eastern Division, in words and figures following, to-wit:

6

IN THE UNITED STATES DISTRICT COURT.

(Caption—55-C-1883)

COMPLAINT.

Now come the plaintiff railroad companies (hereinafter referred to as "Terminal Lines") The Atchison, Topeka and Santa Fe Railway Company; The Baltimore and Ohio Railroad Company; The Chesapeake and Ohio Railway Company; Chicago & Eastern Illinois Railroad Company; Chicago and North Western Railway Company; Chicago, Burlington & Quincy Railroad Company; Chicago, Great Western Railway Company; Chicago, Indianapolis and Louisville Railway Company; Chicago, Milwaukee, St. Paul and Pacific Railroad Company; Chicago North Shore and Milwaukee Railway; Chicago, Rock Island and Pacific Railroad Company; Chicago South Shore and South Bend Railroad; Erie Railroad Company; Grand Trunk Western Railroad Company; Gulf, Mobile and Ohio Railroad Company; Illinois Central Railroad Company; Minneapolis, St. Paul & Sault Ste. Marie Railroad Company; The New York Central Railroad Company; The New York, Chicago and St. Louis Railroad Company; The Pennsylvania Railroad Company; Wabash Railroad Company; and the plaintiff Railroad Transfer Service, Inc. (hereinafter referred to as "Transfer"), and for their cause of action against the defendants, and each of them, say as follows:

1. Each Terminal Line is a common carrier by rail, engaged in the interstate transportation of passengers and property for hire to, from, and within, the City of Chicago, and, as such carrier, is subject to the provisions of a certain act entitled "An act to Regulate Interstate Commerce" (49 U. S. C. A. § 1 et seq.). Pursuant to said act and filed tariffs, each Terminal Line has authority and obligation to transport through interstate passengers between their respective terminals in the City of Chicago, subject to the jurisdiction of the Interstate Commerce

Commission. Transfer is a Delaware corporation, with its principal office located in Chicago, Illinois, and is engaged, as more particularly hereinafter set forth, as the exclusive Agent of the Terminal Lines to perform for them the required interstation passenger and baggage transfer service which they themselves are required by said filed tariffs to provide, all pursuant to a certain written agreement (hereinafter referred to as "Agency Contract"), a copy of which is attached hereto as Exhibit A and by specific reference incorporated herein the same as if set forth verbatim herein.

2. The defendant City of Chicago is a municipal corporation located within the County of Cook and State of Illinois and existing under and by virtue of the laws of said state; the defendant Richard J. Daley is the duly elected, qualified and acting Mayor of said city; the defendant John E. Melaniphy is the duly appointed, qualified and acting "Acting Corporation Counsel" of said city; the defendant Timothy J. O'Connor is the duly appointed, qualified and acting Commissioner of Police of said city; and the defendant William P. Flynn is the duly appointed, qualified and acting Public Vehicle License Commissioner of said city.

3. At all times here material, there was and is in full force and effect within the corporate limits of the defendant City of Chicago a certain ordinance (hereinafter referred to as "Ordinance"), commonly known as the "Public Passenger Vehicle Ordinance" (Mun. Code of Chicago, § 28-1 through § 28-32, both inclusive), a copy of which said Ordinance is attached hereto as Exhibit B and by specific reference made a part hereof the same as if set forth verbatim herein. Said Ordinance purports to license and to regulate the operation of certain categories of public passenger vehicles for hire as defined in Section 28-1 thereof.

4. The Terminals Lines and Transfer have specifically and repeatedly advised the defendant City of Chicago, through the defendants Daley, Melaniphy and Flynn, its duly elected or appointed officials, that the provisions of said Ordinance did not apply to the operations of Transfer pursuant to the Agency Contract, Exhibit A; and, further, that if said Ordinance did apply to such operations, said Ordinance was void as an attempt to regulate Interstate Commerce in contravention of Art. 1, Sec. 8, Cl. 3 of the

Constitution of the United States; despite said advice, the defendant City of Chicago, acting through the defendants Daley, Melaniphy, O'Connor and Flynn, its duly authorized officials, has asserted and continues to assert that said Ordinance is valid and enforceable against Transfer, and that the defendant City of Chicago, acting through its officers, agents, servants and employees, would attempt to enforce said Ordinance against Transfer as a violator thereof by arresting Transfer's drivers operating its passenger motor vehicles used in the performance of Transfer's operations under the Agency Contract upon the streets of the City of Chicago without Transfer obtaining the "terminal vehicle license" for each such passenger motor vehicle as required by Section 28-2 of said Ordinance.

10. 5. The purpose of this action is to seek and obtain a declaration and determination of the inapplicability of said Ordinance to the operations carried on by Transfer's passenger motor vehicles pursuant to its aforesaid Agency Contract, or the unconstitutionality or voidness of said Ordinance. The jurisdiction of this Court is involved pursuant to 28 U. S. C. § 1331 and § 1337; the amount in controversy exceeds \$3,000.00.

6. Terminal Lines have filed tariffs with the Interstate Commerce Commission and the Illinois Commerce Commission for through passenger service (hereinafter referred to as "through service") from points outside Chicago to points beyond Chicago on, or reached via, the incoming and outgoing participating Terminal Lines. Over 99% of all such through passenger service is in interstate commerce.

The terminal station of each of the Terminal Lines is located in some one (1) of the eight (8) terminal railroad stations located in downtown Chicago (hereinafter referred to as "terminal stations"), as set forth in Exhibit C attached hereto and by specific reference incorporated herein the same as if set forth verbatim herein.

Three (3) of the terminal stations are used by one (1) Terminal Line; four (4) other terminal stations have from two (2) to four (4) Terminal Lines each; and one (1) terminal stations has six (6) Terminal Lines.

11. The relative location of the eight (8) terminal stations makes use of motor vehicle transportation desirable for passenger and baggage transfer between terminal stations to provide a link in the through or continuous

passenger transportation via Chicago wherever the Terminal Lines involved are not located in the same terminal station.

Under applicable tariffs, through passenger transportation service includes any required passenger and baggage transfer service from the terminal station in Chicago of the incoming line (hereinafter referred to as "Incoming Station") to the terminal station in Chicago of the outgoing line (hereinafter referred to as "Outgoing Station").

To eliminate the added expense of such required transfer as an influencing competitive factor for through passenger transportation purposes via Chicago, the Terminal Lines provide by tariff that any such required transfer service shall be without additional charge where the fare to destination is more than a specified minimum sum. Where the fare to destination is less than such minimum, a fixed charge which varies with the fare must be added to cover the required transfer service and collected at the time of issue of valid transportation. The entire expense of the required transfer service is absorbed by the Terminal Lines.

7. The required passenger and baggage transfer service to which the holder of through passenger transportation is entitled embraces three separate categories of 12 transfer service by motor vehicles:

(a) The transportation of the through passenger with, or without accompanying hand baggage, from the Incoming Station to the Outgoing Station shown on the Transfer Coupon (hereinafter referred to as "Coupon") issued to him as part of his through ticket for that purpose, upon delivery of the Coupon for cancellation to the Terminal Lines' Agent at the Incoming Station. Over 99% of all Coupon holders are transported with accompanying hand baggage; and in the case of 65% of all Coupon holders, such accompanying hand baggage consists of more than one article.

Ample accommodations for carrying hand baggage in a passenger motor vehicle suitable for the inter-station transportation of Coupon holders and accompanying hand baggage in the same vehicle having due regard for the safety, comfort and convenience of such passengers and the security of such hand baggage, embrace from 25% to 35% of the total available passengers and hand baggage carrying space in that vehicle;

(b) The interstation transportation of the hand baggage of the Coupon holder, unaccompanied by him, upon delivery of his Coupon for cancellation to the Terminal Lines' Agent at the Incoming Station. For this purpose, the passenger motor vehicle transporting Coupon holder or some suitable vehicle may be used;

(c) The interstation transportation of baggage checked through on the passenger's ticket (hereinafter referred to as "checked baggage"). Checked baggage is handled in motor vehicles separate from the motor vehicles in which the Coupon holders are transferred; and the required transfer is carried out by the Terminal Lines without action by the arriving through passenger.

8. For the effective period of the Agency Contract commencing with October 1, 1955, to September 30, 1960, the Terminal Lines have provided a transfer service between the terminal stations to be operated by Transfer with its own passenger motor vehicles and motor trucks, to perform as the Agent of Terminal Lines the three required transfer services which the Terminal Lines themselves are required by tariff to perform. The compensation to Transfer for its services, rendered as Agent for the Terminal Lines, to each through passenger is fixed by the Agency Contract on a schedule of specified per Coupon charges; and such specified charges apply in every case where any one of the three categories of required transfer service is rendered to the through passenger regardless of whether all, or only part, of such three categories of required transfer service are, or is, in fact rendered to him. Transfer is required to furnish and operate during the entire effective period of the Agency Contract a sufficient number of suitable passenger vehicles to carry out its passenger and hand baggage transfer service thereunder, and a sufficient number of suitable other vehicles to carry out its checked baggage transfer service thereunder.

9. Since October 1, 1955, to the present time and for the effective period of the Agency Contract, Transfer

14. (a) has devoted and will devote its passenger motor vehicles operating under the Agency Contract exclusively for use in the transportation of Coupon holders only, and (b) has operated and will operate these vehicles for the performance only of the required interstation passenger and hand baggage service which the Terminal

Lines are required by tariff to provide to their through passengers.

10. For all purposes material herein, there is a decisive difference between the scope of the operations of Transfer's passenger motor vehicles under the Agency Contract and since October 1, 1955, and the scope of the operations of the passenger motor vehicles in the period prior to October 1, 1955 (hereinafter referred to as "Prior Period") of the motor transportation enterprise (hereinafter referred to as "Prior Operator") which performed during the Prior Period required interstation passenger transfer service for Coupon holders. This decisive difference is that the Prior Operator's passenger motor vehicles were devoted in part to the use of two additional operations which are in the nature of local transportation (hereinafter referred to as "Additional Operations") but which Transfer is not required to carry on under the Agency Contract and which Transfer in fact has not carried on since October 1, 1955, to the present time, and will not carry on during the effective period of the Agency Contract.

(a) In connection with the passenger and hand baggage service to Coupon holders during the Prior Period, friends or relatives desiring to accompany a Coupon holder from his Incoming Station to his Outgoing Station were then accepted by the Prior Operator as passengers 15 (without baggage) for transportation from that Incoming Station to the Outgoing Station by the same passenger motor vehicle of the Prior Operator which transported that Coupon holder, upon the payment by the noncoupon holder to the driver of that vehicle of a flat fare per passenger—which fare was uniform without regard to distance between terminal stations; and

(b) In lieu of the required station-to-station transfer service to the Coupon holder during the Prior Period, the Prior Operator's passenger motor vehicle would take a Coupon holder to any hotel or other terminus in the loop district of Chicago as a convenience to that Coupon holder, as requested by him of the driver. In such case, the Coupon was collected for cancellation and the Coupon holder was not entitled thereafter to further transportation from his hotel or other loop district terminus destination to the Outgoing Station; and upon the delivery of that cancelled Coupon by the Prior Operator to the ap-

plicable Terminal Line, the Prior Operator would be paid for this accommodation service in the nature of local transportation to the Coupon holder.

11. Prior to October 1, 1955, Transfer paid all applicable state license fees and Chicago City vehicle taxes, and became authorized to operate, and is presently operating, as a contract carrier of property under the laws of Illinois.

12. The Ordinance has no application to Transfer's passenger motor vehicles:

(a) Transfer's vehicles are excepted from regulation of the Ordinance under Section 28-1 thereof;

16 (1) Section 28-1 provides as follows:

"'Public passenger vehicle' means a motor vehicle, as defined in the Motor Vehicle Law of the State of Illinois, which is used for the transportation of passengers for hire, excepting those devoted exclusively for funeral use or in the operation of a metropolitan transit authority or public utility under the laws of Illinois."

The specifications that a passenger motor vehicle, otherwise includible for regulation under the Ordinance (hereinafter referred to as "Includible Vehicle"), would become an excluded vehicle free from such regulation (hereinafter referred to as "Excepted Vehicle") if it is devoted "exclusively" in the operation of a public utility under the laws of Illinois has been in the Ordinance since January 30, 1952. From December 28, 1945 to December 20, 1951, a public passenger vehicle otherwise qualified as an Includible Vehicle would become an Excepted Vehicle "if it is used as part of, and in connection with," the operation of a public utility in the City of Chicago. From December 20, 1951, to January 30, 1952, such vehicle would become an Excepted Vehicle if "it is used in operation" of a public utility under the laws of Illinois. From January 30, 1952 to the present time, such vehicle would become an Excepted Vehicle if it is devoted "exclusively" * * * in the operation of a public utility under the laws of Illinois":

(2) Under the laws of Illinois, a passenger vehicle operated for hire otherwise qualified, is treated as being "operated as a public utility" if such operation performs a service defined by the Public Utilities Act to be a "public utility" operation, whether such public utility operation is the service offered by the operator of

the vehicle or by some other party qualified to offer such service, through the operation of the Excepted Vehicle by its operator as the Agent of such other party. (Ill. Rev. Stat. (1953) c. 111 $\frac{2}{3}$, Sec. 10.3);

(3) Each of the Terminal Lines is a public utility as defined in "An Act to regulate public utilities" (Ill. Rev. Stats. (1953) c. 111 $\frac{2}{3}$, Sec. 1 *et seq.*). Said Act was at all times here material, and is now in full force and effect as a part of the laws of the State of Illinois (hereinafter referred to as "Public Utilities Act"). Each Terminal Line is a "common carrier," as defined in paragraph 10.4 of said section, engaged in the "transportation of persons" as defined in paragraph 10.7 of said section:

"10.7 'Transportation of persons' defined. 'Transportation of persons' includes any service in connection with the receipt, carriage and delivery of the person transported and his baggage, and all facilities used or necessary to be used in connection with the safety, comfort and convenience of the person transported."

Paragraph 10.15 of said Section provides:

"10.15 'Service defined. 'Service' is used in its broadest and most inclusive sense, and includes not only the use or accommodation afforded consumers or patrons, but also any product or commodity furnished by any public utility and the plant, equipment, apparatus, appliances, property and facilities employed by, or in connection with, any public utility in performing any service or in furnishing
18 any product or commodity and devoted to the purposes in which such public utility is engaged and to the use and accommodation of the public."

The passenger motor vehicles of Transfer operated by it as Exclusive Agent of the Terminal Lines under the Agency Contract to provide the required passenger and hand baggage transfer service which they themselves are required by tariff to perform, provides the service of the Terminal Lines specified in paragraph 10.15 above quoted. Accordingly, each of these passenger motor vehicles of Transfer is an Excepted Vehicle under Section 28-1 of the Ordinance;

(b) Transfer's passenger vehicle is not intended by the Ordinance to be a "terminal vehicle" as defined under Section 28-1 of the Ordinance in effect at all times after October 1, 1955, to the present time.

(1) By Amendment of December 20, 1951 (hereinafter

referred to as "1951 Amendment"), Section 28-1 defined "terminal vehicle" as follows:

"'Terminal Vehicle' means a public passenger vehicle which is operated under contracts with railroad and steamship companies, exclusively for the transfer of passengers between terminal stations designated on through route railroad and steamship tickets."

(2) This 1951 Amendment created a special class of Includible Vehicle, designated as a "terminal vehicle" conforming to the following qualifying specifications:

19 (aa) the vehicle must be operated under contract between its operator and railroads and steamship companies; and

(bb) the contracted operations of the vehicle must be limited exclusively to the transfer of passengers between terminal stations designated on through railroad and steamship tickets;

(3) These qualifying specifications made possible the passenger transportation by the same terminal vehicle between the same designated terminal stations of two distinct categories of persons as passengers:

(aa) persons holding through railroad or steamship tickets who required such interstation transfer to reach their outgoing train or steamship to continue through transportation; and

(bb) other persons who might or might not be railroad or steamship passengers at the time when they were accepted as passengers of the terminal vehicle;

(4) By Amendment of January 30, 1952 (hereinafter referred to as "January 1952 Amendment"); Section 28-1 defined a terminal vehicle as follows:

"'Terminal vehicle' means a public passenger vehicle which is operated under contracts with railroad and steamship companies, exclusively for the transfer of passengers from terminal stations designated on railroad and steamship tickets."

20 (5) The January 1952 Amendment changed the qualifying specifications of a terminal vehicle in effect prior thereto in one respect only. The destination points of the terminal vehicle transportation were not restricted by the January, 1952 Amendment to the terminal stations designated on railroad and steamship tickets. Accordingly, the origin point of the terminal vehicle transportation was re-

quired to be a terminal station of a railroad or steamship company, but the destination points of the terminal vehicle transportation were unrestricted within the area over which the City had jurisdiction, and such destination points could be for the first time an outlying railroad station or a hotel, home, office or business establishment within the city limits of Chicago;

(6) By Amendment of December 20, 1952 (hereinafter referred to as "December 1952 Amendment"), Section 28-1 and Section 28-31 defined a terminal vehicle and a terminal vehicle operator as follows:

"Section 28-1. 'Terminal Vehicle' means a public passenger vehicle which is operated under contracts with railroad and steamship companies, exclusively for the transfer of passengers from terminal stations."

"Section 28-31. No person shall be qualified for a terminal vehicle license unless he has a contract with one or more railroads or steamship companies for the transportation of their passengers from terminal stations."

(7) The December 1952 Amendment changed the qualifying specifications of a terminal vehicle in effect prior thereto in one respect only. Passengers of the terminal vehicle were required to include passengers of the railroads and steamship companies with which the terminal vehicle operator had the contract or contracts for the transfer services of the vehicle involved. Prior to the effective date of the December 1952 Amendment, such railroad and steamship company passengers were permitted, but not required, passengers of the terminal vehicle;

(8) On June 13, 1955, the Terminal Lines formally notified Prior Operator that they would not require its passenger and hand baggage transfer services for their through passengers, effective at the close of business on September 30, 1955, or at any time prior thereto should any curtailment of service on the part of that Prior Operator be effected for any reason whatsoever;

(9) By Amendment of July 26, 1955 (hereinafter referred to as "1955 Amendment"), effective to the present time, Section 28-1 defined a terminal vehicle as follows:

"Section 28-1. 'Terminal vehicle' means a public passenger vehicle which is operated exclusively for the transportation of passengers from railroad terminal stations

and steamship docks to points within the area defined in Section 28-31".

Section 28-31 provided:

"Section 28-31. Terminal vehicles shall not be used for transportation of passengers for hire except from railroad terminal stations and steamship docks to destinations in the area bounded on the north by E. and W. Ohio Street; on the west by N. and S. Desplaines Street; on the south by E. and W. Roosevelt Road; and on the east by Lake Michigan."

22 (10). The 1955 Amendment changed the qualifications of a terminal vehicle in effect prior thereto in two respects:

(aa) the operation of a terminal vehicle need not be carried on under any contract between its operator and a railroad or steamship company; and

(bb) the passengers of the terminal vehicle were not required to include railroad or steamship passengers;

(11) A passenger vehicle of Transfer devoted exclusively for use under the Agency Contract conforms to the following distinctive specifications:

(aa) the origin point of the passenger transfer service performed by such Transfer vehicle is limited to terminal stations and steamship docks, and the destination point is limited to terminal stations and steamship docks designated on the railroad and steamship tickets of the passenger transported by it;

(bb) the only person qualified to become such a passenger is a holder of through transportation;

(12) A passenger vehicle of Transfer conforming to the specifications of subparagraph (11) conforms also to the following specifications to cause it to be excluded from the category of "terminal vehicle" either as an Excepted Vehicle under Section 28-1 of the Ordinance or as a vehicle whose operations are excluded from that category through the constitutional and statutory limitations on the City to include it therein:

(aa) the vehicle's operation is performed exclusively under railroad and steamship company contracts;

(bb) the vehicle's passengers are confined exclusively to the passengers;

23 (cc) the vehicle transportation service to these passengers is their required service;

(dd) the legal requirement for their service arises either under the Public Utilities Law of Illinois as an intrastate commerce service under the Interstate Commerce Commission Act and/or as an interstate commerce action. Accordingly, Transfer's passenger vehicles are not terminal vehicles under the Ordinance as amended on July 26, 1955, in effect to the present time;

(13) The possible applicability of the 1955 Amendment to the passenger vehicles of the Prior Operator from July 26, 1955, through September 30, 1955, in the Prior Period when its passenger vehicles were operated under contractual arrangements with the Terminal Lines to provide the required interstation transfer service for Coupon holders, and thereafter subsequent to the termination of such contractual arrangements, is related to the Additional Operations of these vehicles referred to in paragraph 10 above, which have not been required of Transfer's vehicles by the Agency Contract and have not in fact been performed by Transfer's vehicles since October 1, 1955, to the present time.

13. Section 28-32 of the Ordinance, Exhibit B, attached hereto, prescribes progressive penalties for successive violations of the Ordinance, with each day that the violation continues being treated as a separate offense.

Despite the inapplicability of the Ordinance to Transfer's passenger vehicles, defendants, and each of them, have manifested an intent to recover the penalties from Transfer and its employees provided by said Section 28-32. Plaintiffs are informed and believe and state the fact to be that a 24 period or at least one year could elapse before a final and binding determination of the issues involved with respect to the applicability or inapplicability of the Ordinance to Transfer's passenger vehicles could be effected as a result of such procedure; and, during said entire period of time, Transfer would be required either to assume the cost of defending each separate action or cease operations and by so doing breach its obligations and forfeit its rights under the Agency Contract. The Terminal Lines as a consequence would either be deprived entirely of an essential facility required for the performance of their services in the interstate transportation of passengers or would operate that facility unduly burdened by interruptions in service and weakened by financial hardships. Wherefore, the attempt by the defendants to determine the applicability of

this Ordinance in the manner heretofore alleged, without regard to its ultimate outcome, constitutes an undue burden upon, and interference with, interstate commerce, all in violation of Art. 1, Sec. 8, Cl. 3 of the Constitution of the United States.

14. In the alternative, plaintiffs allege that if the Ordinance is applicable to Transfer's vehicles, it is an attempt to regulate interstate commerce in a field in which Congress has already exercised regulatory power and, therefore, such Ordinance is void as being in violation of Art. 1, Sec. 8, Cl. 3 of the Constitution of the United States.

(a) At all times here material, there has been, and now is, in full force and effect a certain statute known as "An Act to regulate interstate commerce", which provides 25 in part as follows:

"The term 'railroad' as used in this part shall include all * * * terminal facilities of every kind used or necessary in the transportation of persons or property designated herein. * * * The term 'transportation' as used in this part shall include * * * other vehicles * * * and all instrumentalities and facilities of shipment or carriage irrespective of ownership or of any contract, express or implied, for the use thereof. * * *" (49 USCA Sec. 1(3) (a).)

"It shall be the duty of every common carrier subject to this chapter to provide and furnish transportation upon reasonable request therefor, and to establish reasonable through routes with other such carriers, and just and reasonable rates, fares, charges, and classifications applicable thereto; and it shall be the duty of common carriers by railroad subject to this chapter to establish reasonable through routes with common carriers by water subject to chapter 12 of this title, and just and reasonable rates, fares, charges, and classifications applicable thereto. It shall be the duty of every such common carrier establishing through routes to provide reasonable facilities for operating such routes and to make reasonable rules and regulations with respect to their operation, and providing for reasonable compensation to those entitled thereto; and in case of joint rates, fares, or charges, to establish just, reasonable, and equitable divisions thereof, which shall not unduly prefer or prejudice any of such participating carriers." (49 USCA Sec. 1(4).)

"All carriers subject to the provisions of this chapter shall, according to their respective powers, afford all reasonable, proper, and equal facilities for the interchange of traffic between their respective lines and connecting lines, and for the receiving, forwarding, and delivering of passengers or property to and from connecting lines; and shall not discriminate in their rates, fares, and charges between connecting lines, or unduly prejudice any connecting line in the distribution of traffic that is not specifically
26 routed by the shipper. As used in this paragraph, the term 'connecting line' means the connecting line of any carrier subject to the provisions of this chapter or any common carrier by water subject to chapter 12 of this title." (49 USCA Sec. 3(4).)

The power to regulate the manner in which a railroad shall carry out its responsibilities under the aforesaid Sections of the Interstate Commerce Act is vested by Congress exclusively in the Interstate Commerce Commission by Section 12 etc. of that Act.

(b) Under the foregoing provisions, a motor vehicle transportation company may be used by a railroad, as an agent or under a contractual arrangement, to perform required transfer services for the account of the railroad within its terminal area. When such services are performed by such a motor vehicle transportation company, for a railroad only, these services become the services of the railroad which are subject to regulation under the Interstate Commerce Act in the same manner as if they were performed by the railroad itself.

15. In the alternative, plaintiffs allege, that if not inapplicable or invalid for the reasons heretofore set forth in this Complaint, said Ordinance is invalid as an undue burden on interstate commerce in violation of Art. 1, Sec. 8, Cl. 3 of the Constitution of the United States.

(a) Section 28-31.1 of the Ordinance provides as follows:

27. "28-31.1 Public Convenience and Necessity. No license for any terminal vehicle shall be issued except in the annual renewal of such license or upon transfer to permit replacement of a vehicle for that licensed unless, after a public hearing held in the same manner as specified for hearings in Section 28-22.1, the commissioner shall report to the council that public convenience and necessity

require additional terminal vehicle service and shall recommend the number of such vehicle licenses which may be issued.

"In determining whether public convenience and necessity require additional terminal vehicle service due consideration shall be given to the following:

1. The public demand for such service;
2. The effect of an increase in the number of such vehicles on the safety of existing vehicular and pedestrian traffic in the area of their operation;
3. The effect of an increase in the number of such vehicles upon the ability of the licensee to continue rendering the required service at reasonable fares and charges to provide revenue sufficient to pay for all costs of such service, including fair and equitable wages and compensation for licensee's employees and a fair return on the investment in property devoted to such service;
4. Any other facts which the commissioner may deem relevant.

If the commissioner shall report that public convenience and necessity require additional terminal vehicle service, the council, by ordinance, may fix the maximum number of terminal vehicle licenses to be issued not to exceed the number recommended by the commissioner."

28 Section 28-1 provides:

"28-1. As used in this chapter:

"'Commissioner' means the public vehicle license commissioner, or any other body or officer having supervision of public passenger vehicle operations in the city."

(b) Plaintiffs allege and so state the facts to be that the power of the Commissioner to determine the maximum number of additional terminal vehicles to be issued and the power of the City Council to fix the maximum number of additional terminal vehicle licenses to be issued up to the maximum number of additional licenses determined by the Commissioner constitute powers in them to determine the sufficiency of the number of passenger vehicle facilities necessary to provide adequate interstation transportation service which the Terminal Lines are required by law to provide to their interstate through passengers, without knowledge of the volume and nature and distinctive char-

acteristics of the interstate passenger business via Chicago as a junction point.

A proper exercise of this power by the Commissioner and the City Council requires, as a minimum, the knowledge of all the factors which influence the demand for, and supply of, suitable passenger vehicles with suitable
29 hand baggage compartments to provide ample suitable passenger vehicles necessary to perform the required interstation passenger and hand baggage transfer service for all the Coupon holders arriving on all the incoming trains of all Terminal Lines within the limited time available therefor to permit all such Coupon holders to continue their through transportation on their scheduled outgoing trains. Such minimum requirement involves knowledge of all the pertinent facts and circumstances in the communities in which the Terminal Lines and their connecting carriers serving Chicago through them operate, and of all the pertinent facts and circumstances in the operation of each and all of the Terminal Lines and of each and all of such connecting carriers, which influence the volume of through passengers traveling through Chicago as a junction point via the same or different participating Terminal Lines through the same or different terminal stations, within the same day or on different days in the same or different week, month or year.

Practically none of these pertinent facts and circumstances are available to the Commissioner and/or the City Council, and the criteria prescribed by Section 28-31.1 for the determination of the necessity for additional terminal vehicles do not, and can not, make such pertinent information available to the Commissioner and the City Council for that purpose.

The exercise of such power by the Commissioner and City Council under such circumstances arbitrarily
30 limits the maximum number of available vehicles available for the required interstation passenger transfer service for the through passengers of the Terminal Lines to the number of terminal vehicles now licensed, without regard to their suitability, or availability for their intended purpose, and to such additional number of terminal vehicles which the Commissioner and the City Council may in their sole discretion determine without regard to the factual basis upon which such discretionary determin-

ation must be predicated, to permit the Terminal Lines to carry out, within the limited time available therefor, the interstation passenger and baggage transfer service which they are required by law to provide with due regard for the safety and convenience of their through passengers and the security of their hand baggage.

(b) Section 28-6 of the Ordinance provides as follows:

"28.6. Upon receipt of an application for a public passenger vehicle license the commissioner shall cause an investigation to be made of the character and reputation of the applicant as a law abiding citizen; the financial ability of the applicant to render safe and comfortable transportation service, to maintain or replace the equipment for such service and to pay all judgments and awards which may be rendered for any cause arising out of the operation of a public passenger vehicle during the license period. If the commissioner shall find that the applicant is qualified and that the vehicle for which a license is applied for is in safe and proper condition as provided in this chapter, the commissioner shall issue a public passenger vehicle license to the owner of the vehicle for the license period ending on the thirty-first day of December following the date of its issuance, subject to payment of the public passenger vehicle license fee for the current year."

31 This Section confers on the Commissioner the sole discretion to select the class of persons and the individuals within that class, to operate the instrumentalities of interstate commerce which the Terminal Lines must use to perform their required passenger transfer service, thereby limiting the number and character of the passenger motor vehicles and the number and qualifications of the operators of such equipment available to the Terminal Lines to perform the interstate transfer service which they are required by law to provide.

16. Plaintiffs have no adequate remedy at law. Should the Ordinance be enforced against Transfer, as heretofore alleged in paragraphs 4 and 13 of this Complaint, each of the more than 115 drivers of Transfer's passenger motor vehicles will be subject to arrest for violation of the Ordinance on each day of operation of such vehicles under the Agency Contract. Such arrests will seriously disrupt the required interstation passenger and hand baggage

transfer service within the limited time available therefor, and will prevent Transfer from performing its required passenger and hand baggage service as Agent for the Terminal Lines for their through interstate passengers in accordance with the time schedules for through interstate passenger service of the Terminal Lines. Such interruption of Transfer's passenger and hand baggage transfer service for through service passengers will result in the disruption of the through interstate passenger service of the Terminal Lines; and such interruption in turn will precipitate a multiplicity of litigation against the Terminal Lines by their through passengers in the Courts and before the Interstate Commerce Commission for the breach by the Terminal Lines of their tariff obligations to provide such service.

Wherefore, plaintiffs pray this Honorable Court to:

(A) Grant a temporary restraining order, without notice, pending the hearing and determination of the application hereinafter made for a preliminary injunction, because of the fact, as alleged herein, that irreparable loss and damage will result to plaintiffs unless such temporary restraining order be granted; and

(B) Grant a preliminary injunction pending a final determination of this case, restraining said defendants, their officers, agents, servants, employees, and attorneys, from enforcing or attempting to enforce said Ordinance against said Railroad Transfer Service, Inc., plaintiff herein, and the named Terminal Lines, plaintiffs herein, their officers, agents, servants or employees; and

(C) Declare that Chapter 28 of the Municipal Code of Chicago (the Ordinance herein involved) is inapplicable to Railroad Transfer Service, Inc., plaintiff herein, and to the named Terminal Lines, plaintiffs herein, for which it is acting as agent in the operation of the passenger vehicles herein involved; or, in the alternative, to declare that said Ordinance is void as applied to said Plaintiffs; and

(D) Perpetually enjoin the defendants; their officers, agents, servants, employees and attorneys, from enforcing or attempting to enforce said Ordinance against Railroad Transfer Service, Inc., plaintiff herein, and the named Terminal Lines, plaintiffs herein, their officers, agents, servants or employees; and

(E) Grant plaintiffs such other and further relief as may seem just in the premises.

The Atchison, Topeka and Santa Fe Railway Company; The Baltimore and Ohio Railroad Company; The Chesapeake and Ohio Railway Company; Chicago & Eastern Illinois Railroad Company; Chicago and North Western Railway Company; Chicago, Burlington & Quincy Railroad Company; Chicago Great Western Railway Company; Chicago, Indianapolis and Louisville Railway Company; Chicago, Milwaukee, St. Paul and Pacific Railroad Company; Chicago North Shore and Milwaukee Railway; Chicago, Rock Island and Pacific Railroad Company; Chicago South Shore and South Bend Railroad; Erie Railroad Company; Grand Trunk Western Railroad Company; Gulf, Mobile and Ohio Railroad Company; Illinois Central Railroad Company; Minneapolis, St. Paul & Sault Ste. Marie Railroad Company; The New York Central Railroad Company; The New York, Chicago and St. Louis Railroad Company; The Pennsylvania Railroad Company; Wabash Railroad Company;

By Benjamin F. Goldstein,

Amos M. Mathews,

Their Attorneys,

Railroad Transfer Service, Inc.,

By Benjamin F. Goldstein,

Albert J. Meserow,

Its Attorneys.

34 State of Illinois, }
County of Cook. } ss.

H. B. Siddall, being first duly sworn, on oath deposes and says that he is Vice-Chairman, Western Passenger Association, and the duly authorized agent of the Plaintiff Terminal Lines for the purpose of making this affidavit; that he has read the above and foregoing Complaint and knows the contents thereof and that the same are true of his own knowledge except as to the matters therein stated to be on information and belief, and as to those matters he believes them to be true.

H. B. Siddall.

Subscribed and sworn to before me this 24th day of October, 1955, A.D.

Mary Streit,
Notary Public.

(Notary Seal)

Q

35 State of Illinois, }
County of Cook. } ss.

Alex Baxter, being first duly sworn, on oath deposes and says that he is the Secretary and General Manager of the Plaintiff Railroad Transfer Service, Inc. and its duly authorized agent for the purpose of making this affidavit; that he has read the above and foregoing Complaint and knows the contents thereof and that the same are true of his own knowledge except as to the matters therein stated to be on information and belief, and as to those matters he believes them to be true.

Alex Baxter.

Subscribed and sworn to before me this 24th day of October, 1955, A.D.

Mary Streit,
Notary Public.

(Notary Seal)

Exhibit A.

This Agreement, made as of the first day of October, 1955, by and between the following railroads (hereinafter referred to as "Terminal Lines"):

The Atchison, Topeka and Santa Fe Railway Company
The Baltimore and Ohio Railroad Company
The Chesapeake and Ohio Railway Company
Chicago & Eastern Illinois Railroad Company
Chicago and North Western Railway Company
Chicago, Burlington & Quincy Railroad Company
Chicago Great Western Railway Company
Chicago, Indianapolis and Louisville Railway Co.
Chicago, Milwaukee, St. Paul and Pacific Railroad Company
Chicago North Shore and Milwaukee Railway
Chicago, Rock Island and Pacific Railroad Company
Chicago South Shore and South Bend Railroad
Erie Railroad Company
Grand Trunk Western Railroad Company
Gulf, Mobile and Ohio Railroad Company
Illinois Central Railroad Company
Minneapolis, St. Paul & Sault Ste. Marie Railroad Company
The New York Central Railroad Company
The New York, Chicago and St. Louis Railroad Co.
The Pennsylvania Railroad Company
Wabash Railroad Company

and the following named corporations (hereinafter referred to as "Depot Companies") which are owners of certain railroad terminal facilities in Chicago:

The Baltimore and Ohio Chicago Terminal Railroad Company
Chicago and Western Indiana Railroad Company
Chicago Union Station Company

by their duly appointed Agent, Mr. E. B. Padrick, with offices in Room 436 Union Station, 516 West Jackson Boulevard, Chicago 6, Illinois, Parties of the First Part, and Railroad Transfer Service, Inc. (hereinafter referred to as "Transfer"), a Delaware corporation, with its principal office at 400 West Kinzie Street, Chicago 10, Illinois, Party of the Second Part.

The twenty-one (21) railroads listed above (hereinafter referred to as "Terminal Lines") have filed tariffs for through passenger service (hereinafter referred to as "through service"), from points outside to points beyond Chicago on or reached via the incoming and outgoing participating Terminal Lines and steamship lines, and for the delivery of baggage to or from any terminal station, and any point within the area described in Appendix A attached hereto (hereinafter referred to as the "terminal area"): The terminal station of each of the Terminal Lines is located in some one (1) of eight (8) terminal railroad stations located in the downtown area of Chicago (hereinafter referred to as "terminal station"), in which downtown area are located also the steamer docks. Three (3) of the terminal stations are used by one (1) railroad; five (5) other terminal stations have from two (2) to four (4) railroads each; and one (1) terminal station has six (6) railroads. The relative location of the eight (8) terminal stations and the steamer docks makes the use of motor vehicle transportation desirable for passenger and baggage transfer between terminal stations whenever the railroads involved are not located in the same terminal station, and between the terminal stations and the steamer docks.

Under applicable tariffs, transportation for through service includes any required passenger and baggage transfer from the terminal station in Chicago of the incoming line (hereinafter referred to as "incoming station") to the terminal station in Chicago of the outgoing line (hereinafter referred to as "outgoing station") and from the incoming station to the steamer dock of the outgoing steamer (hereinafter referred to as "outgoing dock") and from the steamer dock of the incoming steamer (hereinafter referred to as "incoming dock") to the outgoing station, and is applicable only for the Terminal Lines and the steamship lines which by separate agreement adopt the terms of this Agreement applicable to them.

The Terminal Lines have found it desirable to provide a transfer service between terminal stations in Chicago, and between said stations and steamer docks.

Transfer has been organized for the purpose of entering into this Agreement. Transfer is ready, willing and able to perform all the required passenger and baggage trans-

fer services specified in this Agreement, all intended to relieve the passenger of the responsibility for caring for the required passenger and baggage transfer in Chicago, and to provide for his passenger transfer, within the limited time available therefor, motor vehicle transportation, with the safety, convenience and comfort generally accepted as an incident of passenger automobile transportation normally available for that purpose; and Transfer has offered to perform all such services upon the terms and conditions and for the charges and collections set forth in this Agreement.

Now, Therefore, It Is Mutually Agreed, as follows:

Passenger and Hand Baggage Transfer Service.

1. Transfer agrees to furnish and perform the following services (hereinafter collectively referred to as "Passenger and Hbaggage Transfer Service"); Hand baggage, also referred to as Hbaggage, as used herein, means baggage that is moved with the passenger, not under check in baggage car service.

(a) To transport in a passenger vehicle the passenger with, or without, accompanying Hbaggage from incoming station or incoming dock to outgoing station or outgoing dock shown on coupon, upon delivery of coupon for cancellation to Transfer's agent at the incoming station or incoming dock, as the case may be.

(b) A passenger traveling in a wheelchair, otherwise qualified, shall become qualified for the Passenger and Hbaggage Transfer Service if his condition is such as to permit him to be transported in regular service.

(c) A passenger who is traveling on a litter or stretcher shall not be qualified for the Passenger and Hbaggage Transfer Service.

2. Transfer shall furnish and perform the Passenger and Hbaggage Transfer Service in accordance with the following:

(a) A time schedule shall be established and maintained seven (7) days per week. Such schedule shall be determined and established in accordance with the incoming and outgoing train schedules with the approval of the Terminal Lines in conference with Transfer. Transfer's agents shall be on duty at each terminal station during periods of transfer.

39 (b) Transfer shall determine the route or routes for this service, and insofar as reasonably practical, such routes shall permit the most expeditious service between the terminal stations involved.

(c) Transfer shall furnish and operate a sufficient number of suitable passenger vehicles to carry out this service. All such vehicles shall have ample accommodations for conveniently and safely carrying its passengers and their accompanying Hbaggage. Air conditioning shall be installed and maintained in these passenger vehicles. These vehicles shall be maintained in a clean, safe and sanitary condition. Passenger equipment used by Transfer in any service under this Agreement will be replaced by Transfer with new equipment within thirty (30) months after the commencement of its use. If, in the opinion of Transfer, there is a need for a different type of vehicle, and such vehicle is acceptable to the Terminal Lines, the period of replacement of such type of vehicle will be arranged through mutual agreement between Transfer and the Terminal Lines. Equipment other than passenger equipment used by Transfer in this service will be replaced by Transfer as necessary or desirable for high-grade service.

(d) Insofar as it may be reasonably practical, passenger and his Hbaggage shall be transported in the same passenger vehicle, having due regard for the safety, comfort and convenience of such passenger and the security of such Hbaggage. To the extent that the passenger vehicle does not have adequate space available for transporting the passenger and all his Hbaggage, his excess Hbaggage shall be transported in another vehicle to his outgoing station or outgoing dock so as to make possible the departure of such passenger and all his Hbaggage on the same scheduled outgoing train or outgoing steamer.

(e) All of Transfer's personnel assigned to this service shall wear appropriate uniforms while on duty in this service.

(f) Transfer reserves the right, and shall have the sole right and discretion:

40 (1) To transfer en route passenger and/or his accompanying Hbaggage from one to another of its vehicles, as operating conditions may require;

(2) To refuse to accept for transport in such service any prospective passenger for this service otherwise qualified, and/or to remove any passenger of through service.

in any case where such passenger is under the influence of intoxicating liquors or drugs or is incapable of taking care of himself:

(3) To determine whether, and under what conditions, a household pet as defined in applicable tariffs, which under said tariffs may be brought into the passenger's train space, shall be allowed to accompany him to his place in the passenger vehicle, instead of being placed in the space therein allowed for Hbaggage transport;

(4) To the extent determined by Transfer to be reasonably practical and economically sound, to provide in co-operation with the Terminal Lines involved, special passenger transfer equipment and special services to accommodate passengers traveling in groups, such as athletic teams, show troupes or other groups traveling under special arrangements with such Terminal Lines, and to provide for these groups adequate service and to meet the special conditions surrounding the travel of these special groups; and in the absence of agreement between Transfer and the Terminal Lines involved, such Terminal Lines may make arrangements with others for such special passenger equipment and special services.

3. Transfer shall be entitled to receive compensation computed in accordance with the following schedule for service rendered by it under the Passenger and Hbaggage Transfer Service, which shall be paid by the applicable outgoing Terminal Line or outgoing steamship line, as the case may be:

Schedule of Charges.

Coupons.

(a) Transfer shall be entitled to receive for each cancelled coupon delivered by it to the Terminal Line shown thereon serving the outgoing station, and the Terminal Line handling the passenger from the outgoing station shall be obligated to pay Transfer therefor, a sum of money equal to the applicable per-coupon rate shown in the following schedule:

Military Personnel on Furlough.

(1) For each cancelled coupon shown thereon to have been issued in connection with a valid ticket covering a fare applicable to military personnel on furlough, as passengers—

Applicable Per Coupon Rate, \$0.85.

No change shall be made in that rate except by mutual consent.

Adults.

(2) For each cancelled coupon shown thereon to have been issued in connection with a valid ticket covering a valid fare applicable to adult passengers (other than military personnel on furlough), and showing on the face of such coupon that it was cancelled at a date falling within the consecutive twelve (12) month period (hereinafter referred to as "year") indicated below, following the commencement date of this service, the applicable per-coupon rate shall be the indicated per-coupon rate for that numbered year, as follows:

Year	Applicable Per Coupon Rate
1.....	\$1.20
2.....	1.22
3.....	1.23
4.....	1.25
5.....	1.27

Children.

(3) Children under five (5) years of age accompanied by parent or guardian shall be carried free of charge. For each cancelled coupon shown thereon to have been issued in connection with the ticket covering a fare to a child five (5) years of age or over, as the passenger, the applicable per-coupon rate shall be:

- (aa) fifty per cent (50%) of the current coupon rate applicable to adult fares under paragraph 3 (a) (2) hereof, if the child's fare is for a child passenger five (5) years of age or over, but under twelve (12) years of age; and
- 42 (bb) one hundred per cent (100%) of the current coupon rate applicable to adult fares under paragraph 3 (a) (2) hereof, if the child's fare is for a child passenger twelve (12) years of age or over.

Special Fare Coupons.

(4) The applicable per-coupon rate for each cancelled coupon shall not be changed without mutual consent of Transfer and the Terminal Lines to give effect to the fact either that

(aa) the transportation to which such coupon related covers a group passenger fare rate for the through service involved which is less than the applicable regular passenger fare for the same through service; or

(bb) the passenger to whom such cancelled coupon relates was traveling under special quotation to government agencies.

Additional Special Service Compensation.

(5) In any case where, at the request of a Terminal Line, this service is rendered to a group of passengers involving the use of special baggage equipment to permit the members of the group to meet another train during such period, such as a baseball club, Transfer shall be entitled to receive from the requesting Terminal Line as additional compensation Five Dollars (\$5.00) per hour for each special vehicle for baggage transfer used.

(b) Transfer shall be entitled to receive for each cancelled coupon delivered by it to the outgoing steamship line shown thereon serving the outgoing dock, and the steamship line handling the passenger from the outgoing dock shall be obligated to make payment to Transfer therefor, in accordance with the same schedule of charges specified in paragraph 3 (a) above applicable between Transfer and the applicable outgoing Terminal Line for similar service to the outgoing station.

4. The Passenger and Hbaggage Transfer Service shall commence when the arriving passenger presents himself and his Hbaggage to Transfer for transportation by Transfer, and shall terminate when such passenger is delivered to his outgoing station or outgoing dock and his Hbaggage is delivered to him.

Baggage Car Baggage Transfer Service.

5. Transfer agrees to furnish and perform the following services (hereinafter referred to as "Baggage Car Baggage Transfer Service"):

(a) Transfer's services with respect to such Baggage

Car Baggage Transfer Service shall be to perform during the normal working day established under paragraph 6 (c) hereof, the following services:

(1) To check, bill and manifest (hereinafter referred to as "clerical operations") in the baggage room of each incoming Terminal Line, all incoming baggage articles which that Terminal Line makes available for that purpose (hereinafter referred to as "Unserviced Baggage") to Transfer at a designated space in the baggage room of that Terminal Line commonly known as the Baggage Dock.

(2) To load on its own trailer at the baggage room all such Unserved Baggage on which such clerical operations had been so performed (hereinafter referred to as "Served Baggage") by its employee or employees.

(3) To transport these loaded trailers from the baggage room of the incoming station to the baggage room of the designated outgoing station and there unload them.

(4) To transport these loaded trailers to the steamer docks of the designated steamship line and there unload and deliver the baggage to the said steamship line.

(5) To perform at the steamer dock of each incoming steamship line, clerical operation with respect to Unserved Baggage, as defined above, which that steamship line makes available to Transfer for that purpose, and there to load the Served Baggage on its trailers and to transport these loaded trailers therefrom to the baggage room of the designated outgoing station and there unload them.

6. Transfer shall perform the said Baggage Car Baggage Transfer Service in accordance with the following:

44 (a) Checked baggage covered by this service shall include all such items transported under check for a passenger.

(b) Transfer shall furnish and operate a sufficient number of vehicles suitable to perform the service hereunder.

(c) Transfer shall perform all operations hereunder on a seven (7) day per week basis between the hours of 8:00 A. M. and 5:00 P. M. CST of the same day (hereinafter and hereinafter referred to as "working day") to permit four (4) baggage transfers each day from each terminal station.

(d) Human remains, as defined in applicable tariffs, shall be transported from the baggage room of the re-

questing incoming Terminal Line to the baggage room of the outgoing station; and for that purpose Transfer shall use passenger equipment or its trailers specially adapted for such use, or other suitable equipment.

7. Transfer shall be entitled to receive compensation computed in accordance with the following schedule, from the applicable outgoing Terminal Line or outgoing steamship line, as the case may be, for services performed by it under the Baggage Car Baggage Transfer Service:

Schedule of Charges.

(a) Checked baggage, as defined in paragraph 6 (a) above:

(1) In any case where Transfer has received payment from the outgoing Terminal Line for a cancelled coupon under paragraph 3 (a) hereof, such payment shall be treated by that Terminal Line and by Transfer as payment to Transfer by such Terminal Line for Transfer's services rendered to it under the Baggage Car Baggage Transfer Service with respect to the checked baggage applicable to the through ticket of which the cancelled coupon was a part.

(2) In any case other than paragraph 7 (a) (1) hereof, the charge shall be an amount equal to the amount which Transfer is then currently entitled to receive for each cancelled coupon applicable to the through ticket of which the cancelled coupon was a part.

(3) Human remains moving on regular railroad tickets: two (2) coupons plus \$5.10.

45 (4) Human remains moving on tickets exchanged for Government Transportation Requests will be handled on the basis of two (2) coupons, this to include transfer of escort, so long as the present arrangement for such movement of human remains remains unchanged.

(b) Transfer shall be entitled to receive compensation from the applicable outgoing steamship line for services performed by it under the Baggage Car Baggage Transfer Service computed in accordance with the same schedule set forth in paragraph 7 (a) above applicable to each outgoing Terminal Line for the corresponding service.

Special Baggage Transfer Service.

8. Transfer agrees to furnish and perform the following services (hereinafter collectively referred to as "Special Baggage Transfer Service"):

(a) Subject to the conditions specified in paragraph 8 (b) (3) hereof, to accept baggage delivered by a passenger to Transfer's agent at incoming station for delivery to the parcel room of a designated outgoing station (hereinafter referred to as "PA Service").

(b) Transfer shall furnish and perform the Special Baggage Transfer Service in accordance with the following:

(1) The time schedule determined and established for the Passenger and Baggage Transfer Service pursuant to paragraph 2 (a) hereof shall constitute also the time schedule for the Special Baggage Transfer Service.

(2) In carrying on its operations under this Special Baggage Transfer Service, Transfer may use any vehicle or vehicles used in, or suitable for, any other service rendered by Transfer under this agreement, or any other vehicle suitable for the Special Baggage Transfer Service.

(3) PA Service baggage will be accepted for service hereunder for delivery to the outgoing station upon the presentation to Transfer of applicable coupon, plus the payment of 25¢ per piece of baggage, plus regular applicable parcel room charge for 24-hour service prevailing at the outgoing station. Such service will be available for all passengers up to three hours before scheduled departure of train from outgoing station. PA Service baggage of passengers requesting this service with delivery time of less than the three-hour period, may be accepted by Transfer in accordance with the above upon such conditions of acceptance as Transfer and the passenger may agree upon.

(4) Transfer shall obtain revenues for such services by billing in the usual manner to the outgoing Terminal Line for the coupon involved, and shall retain for itself 25¢ for each piece of baggage and shall remit to the outgoing station parcel room at time of delivery, charges collected for such service.

(5) The Special Baggage Transfer Service commences when the baggage involved therein is received by Trans-

fer's agent at the incoming station; and such service terminates when such baggage is delivered to the parcel room of the outgoing station.

Baggage Pickup and Delivery Service.

9. Transfer agrees to furnish and perform the following services (hereinafter collectively referred to as "Baggage Pickup and Delivery Service"), within the terminal area:

(a) To transport from any point in the terminal area to the unloading platform located in any outgoing station baggage of passenger intended for transport as checked baggage.

(b) To transport any incoming baggage of an incoming passenger from any incoming station to any destination in the terminal area.

(c) Transfer shall furnish and perform the Baggage Pickup and Delivery Service in accordance with the following:

(1) The normal working day determined and established for the Baggage Car Baggage Transfer Service pursuant to paragraph 6 (c) hereof shall constitute also the normal working day for the Baggage Pickup and Delivery Service.

(2) In carrying out its operations under this service, Transfer may use any vehicle or vehicles used in, or suitable for, any other service rendered by Transfer under 47 this Agreement, or any other vehicle suitable for the Baggage Pickup and Delivery Service.

(3) Outgoing baggage will be accepted by Transfer from the passenger and incoming baggage will be accepted by Transfer from the incoming Terminal Line in accordance with the applicable tariffs.

(d) Transfer shall be entitled to receive compensation computed in accordance with the following schedule for services rendered by it under the Baggage Pickup and Delivery Service, payment for which will be received by Transfer in accordance with paragraphs (d) (1), (2), and (3) hereunder:

(1) For incoming baggage delivered by Transfer to the designated address which was forwarded on prepaid delivery check issued by the originating carrier, Transfer shall be entitled to receive compensation for such service.

from the incoming Terminal Line in an amount equal to the applicable tariff charges for such service.

(2) For outgoing baggage delivered by Transfer to the outgoing station, Transfer shall be entitled to retain as its compensation for such service an amount equal to the applicable tariff charge for such service collected by Transfer from the passenger checking such baggage.

(3) Where the incoming baggage delivered by Transfer has been forwarded under collect delivery check, Transfer shall make collection for the account of the incoming Terminal Line of the applicable tariff charge upon making delivery of such baggage at the address of the incoming passenger and shall retain such charges as compensation for its services. Where the outgoing baggage delivered by Transfer to the outgoing station is forwarded under prepaid delivery check, Transfer shall make collection of the applicable tariff charge upon acceptance of the baggage from the passenger and shall retain therefrom the portion of such charge applicable under the tariff

to the movement from the place of pickup to the outgoing station as compensation for its services and shall deliver the balance of the collection to the outgoing Terminal Line at the time of delivery of the baggage to such Terminal Line.

(e) When baggage is delivered to Transfer by the passenger for transportation to an outgoing station, Transfer shall deliver to the passenger the appropriate baggage check under applicable tariffs upon presentation of proper transportation.

(f) For incoming baggage, Baggage Pickup and Delivery Service shall commence when it is delivered to Transfer for delivery to the passenger, and shall terminate when such baggage is delivered to the address designated in the claim check and the passenger's duplicate claim check for such baggage or in the absence thereof a written receipt therefor is procured by Transfer. For outgoing baggage, such service shall commence when it is delivered to Transfer for transport to the designated outgoing station, and shall terminate when such baggage is delivered to the unloading platform of such station and the appropriate receipt is secured therefor.

General Provisions.

10. Transfer agrees that:

(a) Transfer shall establish a radio control system and a central dispatch system at a centrally located site to provide control of movement and dispatch of vehicles used by it in the service under this Agreement, so as to fill the need for them at the time and place required for safe and efficient performance of the required service.

(b) Transfer shall establish a headquarters administration office in association with the central dispatch system office to provide suitable space for the administrative, financial and executive functions of Transfer.

(c) Commencing with the date when any transfer service under this Agreement shall start, and thereafter during the effective term of this Agreement, Transfer agrees to indemnify and save harmless the Terminal Lines and/or Depot Companies, and all steamship lines which by separate agreement shall adopt the terms of this Agreement, their respective officers, employees and agents, and to assume liability imposed by law on any of the parties hereto, for death of, injury to, any persons whomsoever, including, but not limited to, officers, employees, agents, patrons and licensees of the parties hereto, and liability imposed by law on any of the parties hereto for loss of or damage or injury to property, including, but not limited to, that belonging to the parties hereto, arising from, growing out of, or in any manner or degree directly or indirectly caused by, attributable to, or resulting from the acts or omissions, negligent or otherwise, of Transfer, its agents, servants or employees, together with all liability for any expenses, attorneys' fees and costs incurred or sustained by any or all of the Terminal Lines and Depot Companies and steamship lines in connection therewith. Transfer agrees also to release and indemnify and save harmless the Terminal Lines and/or Depot Companies, their respective officers, employees and agents, from all liability imposed by law on them to Transfer, its officers, employees and agents, for deaths or injury to persons and loss of or damage to property (including attorneys' fees, costs and expenses incurred therewith), resulting from railroad operations at or near the area in which operations under this Agreement are conducted, unless such liability results from the sole negli-

gence of the Terminal Lines and/or Depot Companies, their respective officers, employees or agents. Transfer, upon receipt of notice to that effect, shall assume the defense of any claim based upon allegations purporting to bring said claim within the coverage of this section. Without in any manner restricting the extent of the obligations so assumed, Transfer agrees to procure for the additional protection of the Terminal Lines and the Depot Companies and steamship lines and keep in full force and effect at all times during the life of this Agreement 50 contractual-type insurance in form and with companies approved by the Terminal Lines and/or Depot Companies covering the risks and obligations assumed by it under this Agreement subject to all of the terms, conditions and exclusions of the basic policy contract not inconsistent with this Agreement, with full limits of One Million Dollars (\$1,000,000) to be maintained at all times; except as is otherwise provided as to amounts in paragraph 10 (c-1). Such insurance shall contain a provision that it may not be cancelled without thirty (30) days' notice in writing to Earl B. Padrick, Agent for Terminal Lines and/or Depot Companies, and during such thirty (30) days Transfer shall arrange to secure substitute coverage entirely satisfactory to the Terminal Lines and/or Depot Companies. All applicable tariff provisions of Terminal Lines and/or Depot Companies and steamship lines shall inure to the benefit of Transfer.

(c-1). As respects cargo insurance coverage on baggage, Transfer agrees to procure for the additional protection of Terminal Lines and/or Depot Companies and steamship lines, and keep in full force and effect at all times during the life of this Agreement, cargo insurance on baggage and with companies approved by the Terminal Lines and/or Depot Companies covering the risks and obligations assumed by it under this Agreement subject to all of the terms, conditions and exclusions of the basic policy contract, not inconsistent with this Agreement with limits of Fifty Thousand Dollars (\$50,000) per truck or vehicle and Two Hundred Fifty Thousand Dollars (\$250,000) per catastrophe coverage to be maintained at all times. Such insurance shall contain a provision that it may not be cancelled without thirty (30) days' notice in writing to Earl B. Padrick, Agent of Terminal Lines and/or Depot Companies, and during such thirty (30) days Transfer

shall arrange to secure substitute coverage entirely satisfactory to the Terminal Lines and/or Depot Companies. All applicable tariff provisions of Terminal Lines shall inure to the benefit of Transfer.

51 (d) Transfer shall carry Workmen's Compensation and Employers' Liability Insurance to cover Illinois State requirements.

(e) All employees of Transfer shall be covered by Indemnity Bond Insurance.

(f) Appropriate certificates covering all insurance herein shall be delivered by Transfer to the Terminal Lines, Depot Companies, and steamship lines.

(g) All equipment used in the service of Transfer shall be maintained in good repair and capable of performing the transportation service for which it was intended, with safety, efficiency, comfort and convenience to the passengers and to the personnel participating therein; and to the extent considered practical or advisable to construct and equip any semi-trailer with suitable electrical connection equipment and construction to permit connection with suitable wall plugs in the surrounding station area where the semi-trailer is placed, for lighting purposes, to permit operation within the interior of the semi-trailer without the use of tractor power.

(h) Transfer shall create and maintain practices and facilities, including preventative equipment and reserve equipment, to assure that Transfer's equipment used under this Agreement will be at all times in first-class condition and appearance, and that such equipment and the necessary personnel for rendering services therewith will be adequate in amount and number and will be available at the time and place required to provide efficient performance of the services intended for them under this Agreement.

(i) Transfer shall maintain the corporate name "Railroad Transfer Service, Inc."

(j) The color of equipment and any signs or designations appearing on such equipment will be subject to mutual agreement between Transfer and the Terminal Lines.

(k) A copy of the Annual Audit of Transfer as of the end of each of its fiscal years, certified by the certified
52 public accountants employed by Transfer in the regular course of its business, will be delivered by Transfer to the Agent of the Terminal Lines within thirty (30) days after such Annual Audit is completed.

(1) Transfer shall comply at all times with all laws, rules and regulations of governmental agencies having jurisdiction over it, and/or the services performed hereunder.

11. The parties hereto mutually agree that:

(a) Transfer shall not be liable for delays caused by accidents, breakdowns, bad conditions of road, snowstorms and other conditions beyond its control. Transfer does not guarantee to arrive at, or depart from, any terminal station or steamer dock at any specified time, other than to use its best efforts to carry out the operations required for the performance of its service under this Agreement so as not to prevent the departure of the passenger and his baggage at the departure time which he otherwise would meet.

(b) All forms of receipts, manifests and billings adopted for use in the services covered by this Agreement shall be approved by all parties to this Agreement.

(c) All services of Transfer under this Agreement shall commence on the earliest of the following dates (hereinafter referred to as "Service Commencement Date"): October 1, 1955, or a prior date specified in a written request by Agent of the Terminal Lines to Transfer to commence such service, which is delivered to Transfer at least twenty-four (24) hours before such specified date.

(d) The term of this Agreement shall be from the Service Commencement Date, as indicated in paragraph 11(c), to and including September 30, 1960.

(e) During the effective term of this Agreement, the type and character of service, and the charge therefor as provided in this Agreement, shall not be affected in any manner in the event that at any time or times there shall be a decrease in the through passenger transportation service of the Terminal Lines, or in the required
53 passenger and baggage transfer service between terminal stations.

(f) Transfer shall employ and direct all persons performing any service hereunder and such persons shall be and remain its sole employees and subject to its sole control and direction, it being the intention of the parties that Transfer shall be and remain an independent contractor. Transfer agrees to conduct the work provided for herein in its name and agrees not to display the name of any of the Terminal Lines upon or about any of its vehicles.

(g) The procedure for the settlement of accounts shall be as determined by the parties before the commencement of the service.

12. The Terminal Lines and Depot Companies and steamship lines which by separate agreement adopt the terms of this Agreement agree that:

(a) The Terminal Lines and Depot Companies and steamship lines grant to Transfer, without charge on account thereof, the exclusive right and privilege insofar as the Terminal Lines and Depot Companies and steamship lines can legally do so, commencing with the Service Commencement Date and thereafter during the effective term of this Agreement, to solicit the transportation of passengers holding coupons in and around the terminal stations and steamer docks and on the surrounding premises.

(b) Commencing with the Service Commencement Date, and thereafter during the effective term of this Agreement, the Terminal Lines and Depot Companies and steamship lines will permit only equipment and signs of Transfer on their properties or on the terminal properties for the purposes outlined in this Agreement.

(c) Commencing with the Service Commencement Date and thereafter during the effective term of this Agreement, space in each terminal station will be allocated without charge to Transfer for use at the headquarters of its passenger agent and baggage agent.

13. It is the intention of the parties to, and the purpose of, this Agreement that:

(a) To the maximum extent possible, the entire field of passenger and baggage transportation as outlined in this Agreement between all terminal stations and steamer docks where transfer between them is required in the through passenger transportation service of the Terminal Lines, shall be adequately and satisfactorily serviced and shall be serviced exclusively by Transfer; and

(b) The trade name "Railroad Transfer Service" as a baggage transport service, and Transfer as a baggage transport enterprise, shall be identified in the minds of all incoming and outgoing passengers of the Terminal Line using the terminal stations, as the sole and exclusive baggage transport service and enterprise on which the Terminal Lines rely, and in which they place their con-

fidence for prompt, safe, satisfactory and economical baggage transportation service, whenever required between any terminal stations and steamer docks in Chicago. To carry out this intention, the parties agree that:

(1) In the event that any situation, other than those enumerated above in paragraph 8 hereof, shall arise which shall require the use of Transfer's Special Baggage Transfer Service or for the handling of which the use of such service is suitable, the Terminal Lines and Transfer shall co-operate to make use of such service of Transfer upon mutually satisfactory terms.

(2) To the maximum extent possible, the Terminal Lines:

(aa) will refer and recommend that passengers on all their incoming trains avail themselves of the baggage transfer service of Transfer to transport any incoming train baggage from any terminal station to any destination in the terminal area;

(bb) will refer and recommend any inquiries by any persons in the terminal area with respect to a transfer agency to transport to a departing terminal station baggage intended for transportation by the Terminal Lines using such terminal station to avail themselves of the baggage transfer service of Transfer.

(c) Transfer shall give first priority to the use of its vehicles assigned to Baggage Car Baggage Transfer Service for the transfer of baggage intended for transport through Transfer's services under this Agreement.

55 14. Transfer agrees that it will not assign this Agreement, or any rights under it, to any other person, firm or corporation, without the express written permission of the Terminal Lines and Depot Companies, or their Agent acting on their behalf.

In witness whereof the parties hereto have executed this Agreement as of the day and year first above written by their representatives and Transfer has affixed its corporate seal.

Terminal Lines and Depot Companies.

By: E. B. Padrick,

Their Agent.

Railroad Transfer Service, Inc.

By: J. L. Keeshin,

Its President.

Appendix A.

The "terminal area" shall consist of the area within the corporate limits of:

Alsip	Lansing
Argo	Lincolnwood
Bedford Park	Lyons
Bellwood	Markham
Berkeley	Maywood
Berwyn	McCook
Blue Island	Melrose Park
Broadview	Midlothian
Brookfield	Morton Grove
Burnham	Niles
Calumet City	Northbrook
Calumet Park	Northfield
Chicago	North Lake Village
Chicago Heights	North Riverside
Chicago Ridge	Oak Forest
Cicero	Oak Lawn
Crestwood	Oak Park
Des Plaines	Palos Heights
Dixmoor	Palos Park
Dolton	Park Forest
East Hazel Crest	Park Ridge
Elmwood Park	Phoenix (Cook County)
Evanston	Rhodes
Evergreen Park	Riverdale
Fairview (Cook County)	River Forest
Flossmoor	River Grove
Forest Park	Riverside
Forest View	Robbins
Franklin Park	Schiller Park
Glencoe	Skokie
Glenview	South Holland
Golf	Stickney
Harvey	Stone Park
Hazel Crest	Summit (Cook County)
Hillside	Techny
Hodgkins	Thornton
Homewood	Westchester
Hubbard Woods	Western Springs
Justice	Willow Springs
Kenilworth	Wilmette
La Grange	Winnetka
La Grange Park	Worth

Journal—City Council—Chicago—July 26, 1955

New Regulations Prescribed for Operation of Terminal Vehicles Within City.

The Committee on Local Transportation, to which had been referred (June 16, 1955, page 577) a proposed ordinance to prescribe regulations for the operation of terminal vehicles, submitted a report recommending that the City Council pass the substitute proposed ordinance transmitted therewith reading as follows:

Be It Ordained by the City Council of the City of Chicago:

Section 1. Section 28-1 of the Municipal Code of Chicago is amended by striking the definition of "Terminal vehicle" contained therein and substituting therefor the following:

"Terminal vehicle" means a public passenger vehicle which is operated exclusively for the transportation of passengers from railroad terminal stations and steamship docks to points within the area defined in Section 28-31.

Section 2. Section 28-31 of said code is amended to read as follows:

28-31 Terminal Vehicles) Terminal vehicles shall not be used for transportation of passengers for hire except from railroad terminal stations and steamship docks to destinations in the area bounded on the north by E. and W. Ohio Street; on the west by N. and S. Desplaines Street; on the south by E. and W. Roosevelt Road; and on the east by Lake Michigan.

Section 3. Chapter 28 of said code is amended by adding two new sections after Section 28-31 as follows:

28-31.1 Public Convenience and Necessity) No license for any terminal vehicle shall be issued except in the annual renewal of such license or upon transfer to permit replacement of a vehicle for that licensed unless, after a public hearing held in the same manner as specified for hearings in Section 28-22.1, the commissioner shall report to the council that public convenience and necessity require additional terminal vehicle service and shall recommended the number of such vehicle licenses which may be issued.

67 In determining whether public convenience and necessity require additional terminal vehicle service due consideration shall be given to the following:

1. The public demand for such service;
2. The effect of an increase in the number of such vehicles on the safety of existing vehicular and pedestrian traffic in the area of their operation;
3. The effect of an increase in the number of such vehicles upon the ability of the licensee to continue rendering the required service at reasonable fares and charges to provide revenue sufficient to pay for all costs of such service, including fair and equitable wages and compensation for licensee's employees and a fair return on the investment in property devoted to such service;
4. Any other facts which the commissioner may deem relevant.

If the commissioner shall report that public convenience and necessity require additional terminal vehicle service, the council, by ordinance, may fix the maximum number of terminal vehicle licenses to be issued not to exceed the number recommended by the commissioner.

28-31.2 Local Fares) The rate of fare for local transportation of every passenger in terminal vehicles of the licensee shall be uniform, regardless of the distance traveled; provided that children under 12 years of age, when accompanied by an adult, shall be carried at not more than half fare. Such rates of fare shall be posted in a conspicuous place or places within each vehicle as determined by the commissioner.

Section 4. This ordinance shall be effective upon its passage and due publication.

On motion of Alderman Sheridan the committee's recommendation was concurred in and said substitute proposed ordinance was passed, by yeas and nays as follows:

Yeas—Aldermen D'Arco, Metcalfe, Holman, Despres, Jones, Bohling, Johnson, DuBois, Pacini, Nowakowski, Zelezinski, Egan, Burke, Micek, Sheridan, Murphy, McGrath, McKiernan, Campbell, Bonk, Janousek, Tourek, Deutsch, Marzullo, Bieszczat, Sain, Petrone, Pigott, Ronan, Keane, Prusinski, Brandt, Geisler, Laskowski, Cilella, Corcoran, Cullerton, Buckley, Simon, Immel, Bauler, Burmeister, Weber, Young, Hoellen, Freeman, Hartigan, Sperling—48.

Nays—None.

Alderman Cullerton moved to reconsider the foregoing vote. The motion was lost (Alderman Bohling voting "Yea").

Central Station—11th Place and Michigan Avenue.
 Illinois Central Railroad Company.
 The New York Central Railroad Company.

Dearborn Station—Polk and Dearborn Streets.
 The Atchison, Topeka and Santa Fe Railway Company.
 Chicago & Eastern Illinois Railroad Company.
 Chicago, Indianapolis and Louisville Railway
 Company.
 Erie Railroad Company.
 Grand Trunk Western Railroad Company.
 Wabash Railroad Company.

Grand Central Station—Harrison and Wells Streets.
 The Baltimore and Ohio Railroad Company.
 The Chesapeake and Ohio Railway Company.
 Chicago Great Western Railway Company.
 Minneapolis, St. Paul & Sault Ste. Marie Railroad
 Company.

LaSalle Station—LaSalle and VanBuren Streets.
 Chicago, Rock Island and Pacific Railroad Company.
 The New York Central Railroad Company.
 The New York, Chicago and St. Louis Railroad
 Company.

Union Station—Canal and Adams Streets.
 Chicago, Burlington & Quincy Railroad Company.
 Chicago, Milwaukee, St. Paul & Pacific Railroad
 Company.
 Gulf, Mobile and Ohio Railroad Company.
 The Pennsylvania Railroad Company.

North Western Station—Canal and Madison Streets.
 Chicago and North Western Railway Company.

Chicago, North Shore and Milwaukee Station—223
 South Wabash Avenue
 Chicago North Shore and Milwaukee Railway.

Chicago, South Shore and South Bend Station—Ran-
 dolph Street and Michigan Avenue.
 Chicago South Shore and South Bend Railroad.

69 And on the same day, to wit, the 24th day of October, 1955 came the Plaintiff by their attorneys and filed in the Clerk's office of said Court their certain Motion for Temporary Restraining Order and Affidavits of H. B. Siddall and Alex Baxter in words and figures following, to-wit:

70 IN THE UNITED STATES DISTRICT COURT.
* * (Caption—56-C-1883) *

MOTION FOR A TEMPORARY
RESTRAINING ORDER.

Plaintiffs, by their attorneys, move this Court, upon the verified complaint heretofore filed in this cause and upon the affidavits of H. B. Siddall and Alex Baxter, attached hereto as Exhibits "A" and "B" respectively and by specific reference incorporated herein the same as if completely set forth verbatim herein, for a temporary restraining order against the defendants in the above captioned cause and each of them, their agents, servants, officers, employees, attorneys and all acting by, through or for them or on their behalf, pending the hearing and decision of plaintiffs' motion for a preliminary injunction, enjoining and restraining them from enforcing or attempting to enforce Sections 28-1 through 28-32 inclusive of the Municipal Code of Chicago, commonly known as the "Public Passenger Vehicle" Ordinance, against the plaintiff,

Railroad Transfer Service, Inc., and the plaintiff Terminal Lines named in the aforementioned complaint, 71 their officers, agents, servants and employees, and otherwise interfering with or hindering the operation of the plaintiff terminal lines through their agent, Railroad Transfer Service, Inc., in performing transfer service between the various railway terminals located in the City of Chicago, County of Cook, and State of Illinois.

Plaintiffs further move said temporary restraining order be issued forthwith and without notice for the reason that as set forth in detail in said verified complaint and Exhibits A and B attached to this motion, immediate and

irreparable injury, loss and damage will otherwise result to the plaintiffs and their passengers.

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Chicago, Illinois
CEntral 6-7577

Benjamin F. Goldstein,

Amos M. Mathews,

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Benjamin F. Goldstein,

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Chicago 4, Illinois.

Albert J. Meserow,

*Attorneys for plaintiff,
Railroad Transfer Service, Inc.*

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Exhibit A.

State of Illinois }
County of Cook } ss

H. B. Siddall, being first duly sworn, on oath deposes and says as follows:

Affiant is the Vice-Chairman of the Western Passenger Association, and, as a result of his experience in such capacity, is fully familiar with the through railroad passenger transportation service carried on through the Chicago junction point by the twenty-one railroads having passenger terminals in the loop area of Chicago. Affiant is also familiar with the nature and characteristics of passenger transportation by railroad in the United States. On the basis of such knowledge and experience, affiant states as follows:

Twenty-one railroads operate passenger transportation service from and to more than 50,000 points in the United States, either over their own lines, or via connecting carriers, to and from eight terminals located in or closely adjacent to the loop area of Chicago. Three types of passengers use the services of these twenty-one lines: (1) passen-

gers whose rail journey begins at Chicago, Illinois; (2) passengers whose rail journey ends at Chicago, Illinois; and (3) passengers whose rail journey begins and ends at points outside of Chicago, but who pass through Chicago during the course of such journey and do not interrupt their through journey in Chicago. Since none of the terminal lines pass through Chicago, it is necessary that the services of two such terminal lines be employed in completing the journey through Chicago for this class of passengers.

Such through transportation is accomplished by means of a railroad ticket composed of a series of coupons, purchased at the passenger's point of origin and covering his complete transportation to his destination; the passenger makes a single payment to the origin carrier for such transportation. This group of passengers is further divided into two sub-classes: (a) those who move through Chicago via incoming and outgoing carriers located in the same terminal, and (b) those who move through Chicago via incoming and outgoing carriers located in different terminals. (hereinafter called "Transfer Passengers"). This latter sub-class consists of approximately 3,900 passengers per day, approximately 99% of whom are traveling between origin and destination points located in different states. Because of the location of the eight passenger terminals heretofore referred to, the only practical method of providing for the transfer of the Transfer Passengers from the incoming terminal to the outgoing terminal is by means of motor vehicle, equipped to carry such passengers and their accompanying hand baggage simultaneously.

Transportation for these Through Passengers is sold over particular routes, designated on the tickets, and for particular connections between trains at the junction points, the routing being chosen by the passenger from among the available alternatives. Normally, the Through Passenger desires to accomplish his journey within the time between incoming and outgoing trains in Chicago, reduced to a minimum, and such transportation is usually designed to route the Transfer Passenger from Chicago to his destination via the first train scheduled to depart therefrom after his incoming train is scheduled to arrive. Moreover, in many instances, transfers at other junction points are also involved after the Transfer Passenger leaves Chicago. These subsequent transfers are also calculated to.

delay the Transfer Passenger for the minimum amount of time at the subsequent junction point.

The terminal lines are required by law to provide the through transportation heretofore described, and to provide reasonable and proper facilities for the interchange of passengers between their respective terminals. To provide such facilities between the terminals in Chicago, the twenty-one Chicago Terminal Lines have entered into a contract, effective from October 1, 1955 to September 30, 1960, with Railroad Transfer Service, Inc. to provide such service as the agent of the Terminal Lines. The service to be provided under the aforesaid contract is designed to satisfy the distinctive requirements of the Through Passengers, and thus to enable the railroads to fulfill the obligations imposed on them by law.

Any interruption to Transfer's service which would cause the Through Passengers to miss their connections would result in (a) delays in the Through Passenger's journey until the next available outgoing train, either over the same or another terminal line; (b) possible disruption of the schedule of connections at various points between Chicago and the Through Passenger's ultimate destination; and (c) inconvenience to the Through Passenger arising out of the fact that the desired type of railroad car accommodations (often reserved in advance) might not be available on the later, outbound train which would have to be substituted for the outbound train originally scheduled.

In addition to the injury to the passenger arising out of the purpose of his journey (loss of business opportunity, missing of an opportunity to see friends and relatives and other similar consequences) an interruption in service heretofore mentioned would subject the passenger to the additional inconvenience and expense of having to arrange for alternative outgoing transportation and having to maintain himself in Chicago until the time such alternative outgoing train departed.

The car-consist of inbound and outbound trains by the terminal lines is planned to accommodate the normal volume of traffic moving by each train which their experience has taught them to anticipate. Any disruption in Transfer's service would require adjustments in the car-consist of the alternate outbound trains as well as the expense of operating equipment on the scheduled trains for which

anticipated passengers were not available. In addition, the necessary rerouting of passengers would involve the extra expense of rewriting tickets and arranging for accommodations on the alternate train substituted for the outgoing train originally scheduled.

Terminal Lines' through transportation is competitive, in many instances, with other forms of transportation, and the effects of a disruption of Transfer's service, as 76 heretofore mentioned, would result in a loss of good will toward the Terminal Lines and could result in the diversion of its passenger traffic to other forms of transportation.

Affiant makes this affidavit for the purpose of inducing the United States District Court for the Northern District of Illinois, Eastern Division, to grant a temporary restraining order, without notice, restraining the defendants in the above-captioned cause from enforcing the "Public Passenger Vehicle" Ordinance of the City of Chicago (Mun. Code of Chicago, Sec. 28-1 through Sec. 28-32, both inclusive) against the plaintiffs in said cause.

Further affiant sayeth not.

H. B. Siddall.

Subscribed and sworn to before me this 24th day of October, 1955 A. D.

Mary Streit,
Notary Public.

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Exhibit B.

State of Illinois, }
County of Cook, } ss.

Alex Baxfer, first being duly sworn, on oath states as follows:

1. Affiant is Secretary and General Manager of Railroad Transfer Service, Inc. (hereinafter referred to as "Transfer").

2. Transfer devotes all of its sixty (60) passenger motor vehicles owned by it and the one hundred fifteen (115) drivers employed for that purpose, exclusively for use in the operation of the passenger and hand baggage transfer service between the eight (8) terminal stations in the downtown area of Chicago to transfer the through pas-

sengers of the twenty-one (21) Terminal Lines arriving at any one of these stations enroute to another city, with, or without, hand baggage, from their incoming stations to their outgoing stations shown on their through tickets, upon their delivery of the transfer coupons issued in connection therewith for cancellation to Transfer's Agent at the incoming stations. This interstation passenger and hand baggage service is performed by Transfer as Agent for the Terminal Lines, pursuant to the Agency Contract between Transfer and the said twenty-one (21) Terminal Lines using these eight (8) terminal stations, among other things, for their through transportation service:

3. Transfer's passenger vehicles do not accept non-
78 Coupon holders as passengers, and confine the interstation passenger and hand baggage transportation for Coupon holders exclusively between their incoming and outgoing terminal stations. The passenger and hand baggage transfer service of each vehicle commences at the incoming terminal station where the Coupon holder becomes a passenger of Transfer's passenger vehicle and terminates at the outgoing terminal station where the Coupon holder and his hand baggage are delivered.

4. Transfer's operation of these passenger vehicles is conducted on a seven (7) day per week daily time schedule, established and maintained in accordance with the incoming and outgoing train time schedules during the twenty-four (24) hours per day time schedule. The time available for the interstation passenger and hand baggage transfer by Transfer's passenger vehicles is limited by the time interval between the scheduled or actual arrival time of the incoming train on which the Coupon holder arrives and the scheduled or actual departure time of the outgoing train on which that Coupon holder departs in the continuation of his through transportation.

In many cases this time interval is so short that an interruption of a few minutes in the departure of Transfer's passenger vehicle from an incoming station or en route to the designated outgoing station or in the unloading of the Coupon holders and their hand baggage at the outgoing terminal station could cause such through passenger and/or his hand baggage to miss the outgoing train on which
79 they were scheduled to depart:

On or about 3:00 P. M., October 20, 1955, Transfer was notified by the Chicago, Burlington & Quincy Railroad

Company that 193 soldiers of the United States Army were arriving on one of its trains at the Union Station from a far western state under military orders, and that it was necessary to have these soldiers with their accompanying hand baggage transported from that station to the North Western Station within an eighteen (18) minute time schedule between the arrival time of that train and the scheduled departure time of the outgoing train on which they were ordered to proceed to their destination point. To effect this interstation transfer, it was necessary to make use of ten (10) passenger vehicles in addition to the passenger vehicles scheduled for use at that time for the interstation transfer of Coupon holders with accompanying hand baggage in the regular course of Transfer's interstation transfer service under the Agency Contract. The interstation transfer service of these 193 soldiers was carried out by Transfer within the limited available time therefor, without any time whatsoever to spare. This experience is illustrative of many situations where tight limited available time schedules for interstation transfer service by the use of Transfer's passenger vehicles to meet connecting trains occur daily.

The arrest or receipt of a Summons by a driver of Transfer's passenger vehicle while on duty on a repetitive basis or by a number of such drivers on duty at any one time could easily result in the destruction of the morale of such driver or drivers and in the disruption of Transfer's service through the loss of the services of such driver or drivers who would seek employment elsewhere, and could render Transfer helpless in securing replacements.

The nature of Transfer's interstation transfer business and the unpredictable number of Coupon holders at any one or more incoming stations requiring the interstation passenger and hand baggage transfer services of Transfer, and the narrowness of the time interval between connecting train schedules, are such that the loss of service of a single driver on duty at any of the many peak periods during the day could result in many Coupon holders missing their outgoing train connections.

The circumstances surrounding the arrest and service of Summons on a driver on duty for violation of the Ordinance at a time or times when Coupon holders are traveling in, or boarding or departing from, the passenger vehicle

of Transfer involved could easily cause such delay in delivering such passengers to their outgoing stations as to cause them to miss their outgoing train connections, and could easily cause such embarrassment and inconvenience to the passengers of the vehicle involved as to permanently destroy the good will of Transfer's operations as an inter-station transfer agent of the Terminal Lines, and even permanently destroy the good will of the Terminal Lines' through transportation service via Chicago as a junction point.

81 5. The attendance of the drivers in the Courts in defense of the suits by Transfer at the expense of Transfer and with the resulting loss of their services as drivers of its passenger vehicles required for the inter-station transfer service under the Agency Contract would result in complete destruction of the scheduled operations of Transfer required by it under the Agency Contract and necessary for the effective through transportation service via Chicago. Based on its experience to-date, the minimum time which would be required to train a new driver to become an efficient Transfer passenger vehicle driver is ten (10) days.

The extra financial burden to Transfer resulting from the above factors and from the defense of the multiplicity of suits during the time interval required for a final determination of the issues involved in relation to the fixed per Coupon charges to which Transfer is entitled for its services under the Agency Contract, might make it necessary for Transfer either to seriously curtail its transfer services or abandon them entirely.

Alex Baxter.

Subscribed and sworn to before me this 24th day of October, 1955, A. D.

(Notary Seal)

Mary Streit,
Notary Public.

82 And on the same day to wit, on the 24th day of October, 1955, being one of the days of the regular October term of said Court, in the record of proceedings thereof, in said entitled cause, before the Honorable Walter J. La Buy, District Judge, appears the following entry, to wit:

83 IN THE UNITED STATES DISTRICT COURT.
* * (Caption--55-C-1883) * *

**TEMPORARY RESTRAINING ORDER.
NOTICE AND ORDER TO SHOW CAUSE.**

It appearing to the Court from the verified complaint herein and from the motion and supporting affidavits heretofore filed herein by the plaintiffs that a temporary restraining order, preliminary to a hearing upon a motion for injunction, should issue without notice because the defendants will, unless restrained, enforce the "Public Passenger Vehicle Ordinance" of the City of Chicago (Mun. Code of Chicago, Secs. 28-1 through 28-32, inclusive) against the Plaintiff Railroad Transfer Service, Inc. and, consequently, against the plaintiff railroads named in the complaint herein, and such enforcement will disrupt the transfer of railroad passengers between the various terminal stations located in the City of Chicago, thereby disrupting the flow of railroad passengers moving through said city in the course of interstate transportation;

And it further appearing that there is danger of such action taking place before notice can be served and a hearing had on plaintiffs' motion for a temporary injunction;

And it further appearing that the damages from the aforementioned actions cannot be wholly estimated,
84. calculated or compensated for in money, and that such damages will be immediate, substantial and irreparable;

Now, Therefore, It Is Hereby Ordered that the defendants, City of Chicago, a municipal corporation, Richard J. Daley, Mayor of said city, John C. Melaniphy, Acting Corporation Counsel of said city, Timothy J. O'Connor, Police Commissioner of said city, and William P. Flynn, Public Vehicle License Commissioner of said city, and their agents, officers, servants, employees and attorneys,

and any persons acting in concert with or participating with them, and any and all persons acting, by, with, through or under them, or by or through their order, be, and they hereby are, restrained until the 28th day of October 1955 at 2:00 p. m. o'clock M., unless this order be extended beyond said time or dissolved prior thereto, from enforcing or attempting to enforce Sections 28-1 through 28-32, inclusive, of the Municipal Code of Chicago (commonly known as the "Public Passenger Vehicle" Ordinance) against the plaintiff Railroad Transfer Service, Inc., and the plaintiffs, The Atchison, Topeka and Santa Fe Railway Company, The Baltimore and Ohio Railroad Company, The Chesapeake and Ohio Railway Company, Chicago and Eastern Illinois Railway Company, Chicago and North Western Railway Company, Chicago, Burlington & Quincy Railroad Company, Chicago Great Western Railway Company, Chicago, Indianapolis and Louisville Railway Company, Chicago, Milwaukee, St. Paul and Pacific Railroad Company, Chicago North Shore and Milwaukee Railway, Chicago Rock Island and Pacific Railroad Company, Chicago South Shore and South Bend Railroad, Erie Railroad Company, Grand Trunk Western Railroad Company, Gulf, Mobile and Ohio Railroad Company, Illinois Central Railroad Company, Minneapolis, St. Paul & Sault Ste. Marie Railroad Company, The New York Central Railroad Company, The New York, Chicago and St. Louis Railroad Company, The Pennsylvania Railroad Company and the Wabash Railroad Company, or against the officers, agents, servants or employees of each of the aforesaid plaintiffs.

85 **It Is Further Ordered** that the defendants, and each of them, appear before this Court in the United States Court House in the City of Chicago, Illinois, on October 28th, 1955 at 10:06 o'clock A. M., and show cause, if any they have, as to why this restraining order should not be continued or made permanent in accordance with the prayers of the complaint heretofore filed herein.

It Is Further Ordered that a copy of this notice and order, together with a copy of the complaint, be served by the United States Marshal on the defendants forthwith.

This order issued at 11:00 o'clock A. M. this 24th day of October, 1955 A. D.

Walter J. LaBuy,

United States District Judge.

Chicago, Illinois.

86 And afterwards on, to wit, the 27th day of October, 1955 came the Parmelee Transportation Company, by its attorneys and filed in the Clerk's office of said Court its certain Motion to Intervene in words and figures following, to wit:

87 IN THE DISTRICT COURT OF THE UNITED STATES.
* * (Caption--55-C-1883) * *

MOTION OF PARMELEE TRANSPORTATION COMPANY TO INTERVENE AS A DEFENDANT.

Parmelee Transportation Company, a Delaware Corporation, by Lee A. Freeman, its attorney, moves for leave to intervene as a defendant in this action as a matter of right or in the alternative in the court's discretion under Rules 24 (a) and 24 (b) of the Federal Rules of Civil Procedure, in order to assert its rights and interest as set forth in its Intervening Petition, a copy of which is hereto attached.

Parmelee Transportation Company,
a corporation,

By Lee A. Freeman,

Its Attorney.

Lee A. Freeman,
208 S. LaSalle Street,
Chicago, Illinois,
CE. 6-1763.

Attorney for Intervenor.

88 And on the same day, to wit, the 27th day of October, 1955 came the Parmelee Transportation Company by its attorneys and filed in the Clerk's office of said Court its certain Petition to Intervene in words and figures following, to wit:

89 IN THE DISTRICT COURT OF THE UNITED STATES.

* * (Caption—55-C-1883) * *

**PETITION OF PARMELEE TRANSPORTATION
COMPANY TO INTERVENE AS A DEFENDANT.**

Your petitioner, Parmelee Transportation Company, a corporation, by Lee A. Freeman, its attorney, petitions for leave to intervene as party defendant in this action as a matter of right or in the alternative in the court's discretion under Rules 24 (a) and 24 (b) of the Federal Rules of Civil Procedure and as grounds therefor states:

1. Parmelee Transportation Company is a corporation duly organized and existing under and by virtue of the laws of the State of Delaware and is duly qualified to do business in the State of Illinois. For more than 102 years last past, petitioner and its predecessors were engaged and petitioner is now engaged in the business of transporting passengers and baggage for hire in the Chicago terminal area.

90 2. At all times, petitioner conducted its operations in compliance with all ordinances of the city of Chicago and in particular Chapter 28 of the Municipal Code of Chicago. Pursuant to the requirements of Chapter 28 of the Municipal Code of Chicago petitioner applied for public passenger vehicle licenses, demonstrated its financial responsibility, the adequacy of its insurance coverage, the dependability of its drivers, the adequacy and safety of the vehicles proposed to be used in said terminal service and in these and in all other respects duly complied with the requirements imposed by the city of Chicago in the regulation of the use of public streets and ways by public passenger vehicles. After investigation by the public vehicle license commissioner, annual licenses were duly issued covering all of petitioner's motor vehicles proposed for use and used in its public passenger terminal service. These annual licenses have been renewed from

year to year and are now in effect for each of the terminal vehicles used by petitioner in the rendition of its services.

3. Pursuant to the authorizations granted by the city of Chicago and in reliance upon the public passenger terminal licenses issued by the city of Chicago and still held by the petitioner, large expenditures of money have been made by applicant for properties, buildings, structures, equipment and facilities necessary for and used in the
91 conduct of such terminal operations. Petitioner's investment in such properties, buildings, structures, equipment and facilities exceeds \$2,000,000. Petitioner employs over 200 individuals to conduct its public passenger terminal services in Chicago and has developed a business that has developed a substantial transportation of passengers annually and created a goodwill of substantial value.

4. Co-plaintiff, Railroad Transfer Service, Inc. on October 1, 1955, commenced the operation of public passenger terminal services, transporting persons and baggage for hire from railroad terminal stations in Chicago to points within the Chicago terminal area, using the streets and public places of the city of Chicago. Co-plaintiff, Railroad Transfer Service, Inc. is conducting a public transportation service for hire on the streets and public places of the city of Chicago without the requisite Chicago public passenger vehicle licenses prescribed by ordinances of the city of Chicago.

5. Commercial operation of terminal vehicles as conducted by co-plaintiff, Railroad Transfer Service, Inc. has been regarded as essentially local and has been exempted from federal regulation, including regulations applicable to the safety of operations. The city of Chicago by
92 Chapter 28 of the Municipal Code of Chicago has prescribed reasonable controls in the exercise of its police power in order to assure the proper use of its streets for commercial operations and to promote public safety, health and welfare. The reasonable police power requirements of Chapter 28 of the Municipal Code of Chicago are properly applicable and enforceable against co-plaintiff, Railroad Transfer Service, Inc. with respect to its use and operation of public passenger vehicles in the terminal area of the city of Chicago as conducted since October 1, 1955.

6. Defendant has refused to comply and does refuse to comply with the provisions of Chapter 28 of the Municipal Code of Chicago and has generally taken the position that

its aforesaid commercial operations and its terminal vehicles employed therein cannot be licensed or regulated by the city of Chicago. Such operations by Railroad Transfer Service, Inc. without compliance with the reasonable police power requirements imposed by the city of Chicago are unlawful and unauthorized:

7. By reason of the unlawful, unauthorized and unwarranted operations of Railroad Transfer Service, Inc. as aforesaid, substantial interference with petitioner's duly licensed terminal services have been caused. Such operations by Railroad Transfer Service, Inc. have
93 created hazards relating to the safety of petitioner's drivers, vehicles and passengers and the safety of other drivers, vehicles, passengers and pedestrians using the public ways and places in the terminal area of the city of Chicago. Such unlawful, unauthorized and unwarranted operations have substantially and unfairly affected petitioner's business, have inflicted incalculable losses of revenues and profits, have resulted in serious injury to petitioner's goodwill and have severely hampered, impeded and obstructed your petitioner in its attempt to render adequate and lawful public passenger terminal services.

8. Petitioner has a substantial interest in questions of law and fact common to the issues presented in this proceeding and has a substantial interest in maintaining the applicability and validity of Chapter 28 of the Municipal Code of Chicago as it applies to the services performed and vehicles operated by said Railroad Transfer Service, Inc. A decision in these proceedings may materially and adversely affect petitioner's rights and petitioner may be bound thereby. The defendant, City of Chicago, cannot
or may not adequately represent petitioner's interest.

94 9. The complaint in this proceeding was filed on October 24, 1955 and hearings have been set for October 28, 1955 on plaintiffs' motion for a preliminary injunction. The petition for intervention is timely and no delay in these proceedings will be occasioned by the grant of this intervening petition.

Wherefore, petitioner, Parmelee Transportation Company, prays:

A. That it be permitted to intervene in this proceeding.

B. That this petition for intervention be considered and treated as an answer and claim of the intervening petitioner in these proceedings.

C. That the court enter a judgment, decree or order

finding and declaring that the operations by co-plaintiff, Railroad Transfer Service, Inc. of motor vehicles commercially over and upon the city streets and public places from railroad stations to destinations within the terminal area of the city of Chicago as conducted since October 1, 1955, constitutes the operation of public passenger terminal vehicles within the purview of Chapter 28 of the Municipal Code of Chicago and that co-plaintiff, Railroad

Transfer Service, Inc. is required to secure a public
95 passenger terminal vehicle license for each motor vehicle so used and employed and to comply with all reasonable police power requirements imposed by the ordinances of the city of Chicago upon public passenger vehicles and public passenger vehicle operators.

D. That pending the determination of the issues in this cause, the court issue a temporary injunction restraining and enjoining co-plaintiff, Railroad Transfer Service, Inc., its officers, agents, employees and attorneys from engaging in said public passenger terminal service until it has duly obtained the required public passenger terminal vehicle licenses from the city of Chicago to operate upon the streets and public places of the city of Chicago and has otherwise complied with all applicable ordinances of the city of Chicago.

E. That the court set this cause for trial and final hearing and upon the conclusion thereof, that said temporary injunction be made permanent.

F. That the court make such other findings and declaration of rights as may be necessary to adjudicate the controversy between the parties and grant such other temporary or permanent relief as may be necessary to effectuate such declaration of rights or to protect the rights
96 of the parties pending the adjudication of the controversy or to effectuate such declaration of rights and the terms of any order, judgment or decree that may be entered.

Parmelee Transportation Company,
a corporation

By Lee A. Freeman,

Its Attorney.

Lee A. Freeman,

Attorney for Petitioner,

208 S. LaSalle Street,

Chicago, Illinois,

CE 6-1763.

State of Illinois }
 County of Cook } ss.

Charles E. Rheintgen, being first duly sworn on oath deposes and says that he is Vice President of Parmelee Transportation Company, a corporation, Intervening Petitioner herein; that he has read the within and foregoing Petition, by him subscribed, that he knows the contents thereof and that the same is true in substance and in fact.

Charles E. Rheintgen.

Subscribed and sworn to before me this 26th day of October, 1955.

(Notary Seal)

Lilyan Fisher,
Notary Public.

97 And afterwards, to wit, on the 28th day of October, 1955, being one of the days of the regular October term of said Court, in the record of proceedings thereof, in said entitled cause, before the Honorable Walter J. LaBuy District Judge, appears the following entry, to wit:

98 IN THE UNITED STATES DISTRICT COURT.

* * (Caption—55-C-1883) * *

ORDER EXTENDING TEMPORARY RESTRAINING ORDER.

This cause coming on now to be heard upon the rule to show cause why the relief prayed for in the complaint herein should not be granted, due notice of such hearing having been served upon the defendants herein, and the defendants, by their attorneys, having appeared in open court and having consented that the temporary restraining order entered by this Court be extended for the purpose of allowing additional time to prepare for hearing, and the Court being now fully advised in the premises:

It Is Hereby Ordered that the expiration date of the Temporary Restraining Order heretofore entered by this Court in the above-captioned cause on Monday, October 24, 1955 A. D. be, and the same hereby is, extended to Monday, November 7, 1955 A. D. at the hour of 2:00 P.M.

and that the defendants, and each of them, their agents, servants, employees, officers and attorneys, be restrained until November 7, 1955 at 2:00 P. M. according to the provisions of the aforesaid order of October 24, 1955, which said provisions are incorporated herein by reference as fully as if specifically set forth verbatim herein;

It Is Further Ordered that the defendants, and each of them, appear before this Court in the United States Court House in the City of Chicago, Illinois on November 7, 1955 at 10:00 o'clock A. M., and show cause, if any they have, as to why this restraining order should not be continued or made permanent in accordance with the prayers of the complaint heretofore filed;

It Is Further Ordered that the Bond heretofore filed in the above-captioned cause stand as the bond to secure the defendants during the period of this temporary restraining order as herein extended.

This order issued at 11:15 o'clock A. M., this 28th day of October, 1955 A. D.

Walter J. LaBuy,

United States District Judge.

Chicago, Illinois.

100 And afterwards, to wit, on the 7th day of November, 1955, being one of the days of the regular November term of said Court, in the record of proceedings thereof, in said entitled cause, before the Honorable Walter J. La Buy District Judge, appears the following entry, to wit:

101 IN THE UNITED STATES DISTRICT COURT.

* * (Caption—55-C-1883) * *

**ORDER EXTENDING TEMPORARY
RESTRAINING ORDER.**

This cause coming on now to be heard upon the rule to show cause why the relief prayed for in the Complaint herein should not be granted, due notice of such hearing having been served upon the defendants herein, and the defendants, by their attorneys, having appeared in open court and having consented that the temporary restraining order entered by this Court be extended for the pur-

pose of allowing additional time to prepare for hearing, and the Court being now fully advised in the premises:

It Is Hereby Ordered that the expiration date of the Temporary Restraining Order heretofore entered by this Court in the above-captioned cause on Monday, October 24, 1955 A. D., and extended until November 7, 1955 A. D. at 2:00 P. M. by Order entered October 28, 1955 A. D., be, and the same hereby is, extended to Thursday, November 10, 1955 A. D., at the hour of 2:00 P. M., and that the defendants, and each of them, their agents, servants, employees, officers and attorneys, be restrained until November 17, 1955 at 2:00 P. M. according to the provisions 102 of the aforesaid order of October 24, 1955, which said provisions are incorporated herein by reference as fully as if specifically set forth verbatim herein;

It Is Further Ordered that the defendants, and each of them, appear before this Court in the United States Court House in the City of Chicago, Illinois on November 10, 1955 at 10:00 o'clock A. M., and show cause, if any they have as to why this Restraining Order should not be continued or made permanent in accordance with the prayers of the Complaint heretofore filed;

It Is Further Ordered that the Bond heretofore filed in the above-captioned cause stand as the bond to secure the defendants during the period of this Temporary Restraining Order as herein extended:

This Order issued at 2:00 o'clock P. M., this 7th day of November, 1955 A. D.

Walter J. LaBny,

United States District Judge.

Chicago, Illinois.

103 And afterwards on, to wit, the 10th day of November, 1955 there was filed in the Clerk's office of said Court a certain Memorandum in words and figures following, to wit:

104 IN THE UNITED STATES DISTRICT COURT.

* * (Caption—55-C-1883) * *

MEMORANDUM.

The complaint in the above cause requests the court to declare whether or not the "Public Passenger Vehicle Ordinance" purporting to license and regulate the operation of certain categories of public passenger vehicles for hire includes the operations of parties plaintiff; or in the alternative if the ordinance is held applicable that the court declare the same void as an attempt to regulate interstate commerce in the field in which Congress has already exercised its regulatory powers.

Parmalee Transportation Company has filed a petition to intervene in the above matter as a party defendant and requests intervention be granted as a matter of right or in the alternative that it be permitted to intervene in the court's discretion.

The petition to intervene alleges that Parmalee has at all times complied with the Ordinances of the City of Chicago and conducted its operations in compliance therewith; that it has expended large sums of money for properties, buildings, structures, equipment and facilities necessary in the conduct of such terminal operations and that the said investment exceeds two millica dollars plus goodwill of substantial value; that plaintiff, Railroad Transfer Service, Inc., is conducting a public transportation service for hire in Chicago without the requisite vehicle licenses prescribed by its ordinances; that the requirements of the ordinance are properly applicable and enforceable against Railroad Transfer Service, Inc., and its non-compliance therewith is unlawful and unauthorized; that by reason of such unlawful operations of Railroad Transfer

105 Service substantial interference with Parmalee's duly licensed terminal services has been caused; that such unauthorized operation has created hazards relating to the safety of Parmalee's drivers, vehicles and passengers and all other drivers, vehicles, passengers and pedestrians using the public ways in Chicago; that it has substantially

and unfairly affected petitioner's business, inflicted incalculable losses of revenues and profits, results in serious injury to Parmalee's good will and severely hampered, impeded and obstructed Parmalee in rendering adequate and lawful public passenger terminal service. It is alleged that Parmalee has a substantial interest in questions of law and fact common to the issues presented in the main proceeding and a substantial interest in maintaining the applicability and validity of the ordinance; that a decision in these proceedings may materially and adversely affect Parmalee's rights and it may be bound by the judgment herein. It is also alleged that the City of Chicago cannot and may not adequately represent Parmalee's interest.

Subdivision (2) of Rule 24(a) of the Federal Rules of Civil Procedure permits intervention as of right when the representation of the applicant's interest by existing parties is or may be inadequate and the applicant is or may be bound by a judgment in the action. Thus, two elements are involved—that the representation of the applicant's interests by existing parties may be inadequate and that the petitioner for intervention may be bound by a judgment in the action. Both conditions must be shown to exist before intervention as of right is authorized.

The interest which will give rise to intervention as a matter of right must be a direct and legal interest and not one which is general and gives rise to no definite legal rights. It must be such an interest that the intervenor will either gain or lose by the direct legal operation of the judgment made. *Cyc. of Fed. Pro., Vol. 7, §24.12, page 16; Pyre Oil Co. v. Ross, (C. A. 7, 1948) 170 F. (2d) 650, 653.* It is apparently petitioner's theory that its investment, its goodwill and its continued normal operation of business constitute an interest over and beyond that of the defendant City of Chicago and that to protect such individual interest it should be allowed to intervene as a matter of right. It is contended by the parties plaintiff, however, that the "sphere of operations" of the plaintiff Railroad Transfer Service and petitioner Parmalee are not the same and that a judgment in the main action cannot affect the petitioner's status. Such a conclusion is not apparent from the facts which are presently before the court and the question of the right to intervene should only be decided on the posture of the pleadings as they now appear.

The interest disclosed by the petition to intervene is more akin to an interest which a taxpayer has in the effect of a tax law as to him and an interest that the law should be enforced equally as to all within its ambit. Such an interest has not been held to be sufficiently direct to permit intervention as of right particularly where the main action already raises the same issue and is being defended by proper governmental authority. The court recognizes that judgments involving legislative acts will of necessity affect all members within the designated categories of the law.

Conceding that the applicant Parmalee may be bound by a judgment in the main action, certainly there is no basis for assuming that the representation of the applicant's interest by the City is or may be inadequate. Representation by governmental authority is generally considered adequate in the absence of any specific showing to the contrary. The petition for intervention thereby alleges the conclusion that the defendant, City of Chicago, "cannot or may not adequately represent petitioner's interest". It is clear that the City's interest is so extensive with and not antagonistic to that of the petitioner and concededly its duty and interest in defending the operation and validity of the acts of its legislative council is even greater than that of the petitioner. Under the state of the record at present the court is of the opinion it has not been shown that the City of Chicago will not fully and properly represent the intervenor's interest.

Having determined that Parmalee does not have an absolute right to intervene, may it be premitted to intervene under subdivision (b) of Rule 24 "when an applicant's claim or defense and the main action have a question of law or fact in common"? The establishing of a claim or defense for purposes of permissive intervention is not dependent upon a "direct personal or pecuniary interest" in the litigation but more than a general interest in the subject matter is required. Parmalee's interest is reflected in the alleged injurious consequences to it of plaintiff's purported illegal disregard of the ordinance. The court is of the opinion that Parmalee has shown a degree of interest sufficient to permit its intervention under subdivision 107 (b) of Rule 24.

Rule 24 provides that in cases of permissive intervention the court "shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties." Parmalee's petition does

Pages 9 and 10. Rule 13. Amend Item (a) in its entirety to read as follows:

RULE 13

TRANSFER ARRANGEMENTS

(a) Transfer at Chicago, Ill.

When fares published herein are used for constructing through fare from other points of origin via routes where transfer is required between rail depots or between rail depots and steamer docks at Chicago, the following charges will apply:

From Chicago Via Rail Lines

Note.—Transfer coupons may be included without charge in connection with Intermediate Class fares.

Item No.	Where the one-way first class fare from Chicago, Ill. to destination is:	Where the one-way coach fare from Chicago, Ill. to destination is:	Where transfer is required between stations at Chicago one-way fare including transfer will be established as follows:
1	♦\$1.78 or less.....	♦\$0.92 or less.....	♦\$1.20 must be added to cover transfer.
2	♦\$1.79 to \$2.98.....		Basing fare including transfer \$2.98.
3		♦\$0.93 to \$2.12.....	Basing fare including transfer \$2.12.
4	\$2.98 or more.....	\$2.12 or more.....	Transfer coupon may be included without charge.

Omnibus transfers are required in Chicago between all depots except the following lines occupying the same depots jointly.

Railroad	No Transfer to Following Lines	Location of Station	Name of Station
AT&SF.....	C&EI, CI&L, ErieRR, GT or Wab.....	Dearborn and Polk Sts.....	Dearborn.
B&Q.....	C&O, CGW or SooLine.....	Harrison and Wells Sts.....	Grand Central.
C&EI.....	AT&SF, CI&L, ErieRR, GT or Wab.....	Dearborn and Polk Sts.....	Dearborn.
C&NWSsystem.....	(Transfer to all other lines at Chicago).....	Madison and Canal Sts.....	North Western.
C&O.....	B&O, CGW or SooLine.....	Harrison and Wells Sts.....	Grand Central.
CB&Q.....	CMStP&P, GM&O or PRR.....	Jackson Blvd. and Canal St.....	Union.
CGW.....	B&O, C&O or SooLine.....	Harrison and Wells Sts.....	Grand Central.
CI&L.....	AT&SF, C&EI, ErieRR, GT or Wab.....	Dearborn and Polk Sts.....	Dearborn.
CMStP&P.....	CB&Q, GM&O or PRR.....	Jackson Blvd. and Canal Sts.....	Union.
CNS&M.....	(Transfer to all other lines at Chicago).....	223 So. Wabash Ave.....	
CRI&P.....	NYC (Chicago-Danville Line) NYC (Chicago-Niles Line, trains 8 and 17), NYC (Chicago-South Bend Line) or NickelPlate.....	La Salle and Van Buren Sts.....	La Salle.
CSS&SB.....	(Transfer to all other lines at Chicago).....	Randolph St. and Michigan Ave.....	Randolph St.
Erie.....	AT&SF, C&EI, CI&L, GT or Wab.....	Dearborn and Polk Sts.....	Dearborn.
GM&O.....	CB&Q, CMStP&P or PRR.....	Jackson Blvd. and Canal Sts.....	Union.
GT.....	AT&SF, C&EI, CI&L, ErieRR or Wab.....	Dearborn and Polk Sts.....	Dearborn.
IllCent.....	NYC (Chicago-Indianapolis Line) or NYC (Chicago-Niles Line).....	Roosevelt Rd. and Michigan Ave.....	Central.
NYC (Chicago-Danville Line).....	CRI&P, NYC (Chicago-Niles Line, trains 8 and 17) or NickelPlate.....	La Salle and Van Buren Sts.....	La Salle.
NYC (Chicago-South Bend Line).....			
NYC (Chicago-Indianapolis Line).....	IllCent, NYC (Chicago-Indianapolis Line) or NYC (Chicago-Niles Line).....	Roosevelt Rd. and Michigan Ave.....	Central.
NYC (Chicago-Niles Line).....	CRI&P, NYC (Chicago-Danville Line) NYC (Chicago-South Bend Line) or NickelPlate.....	La Salle and Van Buren Sts.....	La Salle.
NYC (Chicago-Niles Line, trains 8 and 17).....			
NickelPlate.....	CRI&P, NYC (Chicago-Danville Line), NYC (Chicago-Niles Line, trains 8 and 17) or NYC (Chicago-South Bend Line).....	La Salle and Van Buren Sts.....	La Salle.
PRR.....	CB&Q, CMStP&P or GM&O.....	Jackson Blvd. and Canal St.....	Union.
SooLine.....	B&O, C&O or CGW.....	Harrison and Wells Sts.....	Grand Central.
Wab.....	AT&SF, C&EI, CI&L, ErieRR or GT.....	Dearborn and Polk Sts.....	Dearborn.

From Chicago Via Steamer Lines

Item No.	Where transfer is between rail depot and steamer dock the following charges will apply:
5	One-way transfer charge of ♦\$1.20 and round-trip transfer charge of ♦\$2.40 must be added in all cases.
	♦ Increase. • Reduction.

not disclose issues which differ from those presented, by the complaint. It does not appear that delay or prejudice will ensue by virtue of its presence in this suit, and in fact this consideration is not discussed or urged by those opposing the petition.

Since it appears to the court that this intervenor's right is based upon the presence of a question of law or fact in common with the main action, the determination of jurisdiction becomes important. In Moore's Federal Procedure, Second Edition, Volume 4, page 137, the jurisdictional requirements on intervention are stated as follows:

"Intervention under an absolute right or under a discretionary right in an in rem proceeding need not be supported by grounds of jurisdiction independent of those supporting the original action. Intervention in an in personam action under a discretionary right must be supported by independent grounds of jurisdiction, except when the action is a class action."

In the instant case, the complaint presents the issues of whether the City of Chicago has properly exercised its powers, whether the City has unduly interfered with interstate commerce, and whether the ordinance applies to plaintiff's operations. Jurisdiction is alleged to exist because of the presence of a federal question. These same issues are presented in the petition to intervene and are the basis for this court's jurisdiction over Parmalee. The petitioner is not making any claim or seeking any personal judgment against the opposing parties which would require a jurisdictional basis different from that presented by the complaint and contained in the petition.

108 The court is of the opinion that permission should be granted to Parmalee Transportation Company to intervene in the above proceedings. An order in accord therewith has this day been entered.

/s/ Walter J. La Buy,

Judge, United States District Court.

Nov. 10, 1955

Haight, Goldstein & Haight
209 South La Salle Street,

Joseph Grossman, Esquire,
c/o Corporation Counsel, City of Chicago,
City Hall,

Lee A. Freeman, Esquire,
208 South La Salle Street.

110 IN THE UNITED STATES DISTRICT COURT.

• • (Caption—55-C-1883) • •

TRANSCRIPT OF PROCEEDINGS.

had on the hearing of the above-entitled cause before the Honorable Walter J. LaBuy, one of the Judges of said Court, in his court room, in the United States Court House, at Chicago, Illinois, on November 10, 1955, at 10:20 o'clock a.m.

199 Mr. Meserow: May we file an affidavit setting up the Council proceedings?

The Court: You may.

Mr. Freeman: I suppose it should be the full Council proceedings, because otherwise I may want to file additional affidavits.

Do you want to file the full transcript?

200 Mr. Meserow: You can. I will file what I read in Court today.

The Court: The intervenor's brief will be in by 12 o'clock on Tuesday; the reply brief will be in 10 o'clock on Friday.

202 And on the same day, to wit, on the 10th day of November, 1955, being one of the days of the regular November term of said Court, in the record of proceedings thereof, in said entitled cause, before the Honorable Walter J. La Buy District Judge, appears the following entry, to wit:

203 IN THE UNITED STATES DISTRICT COURT.

• • (Caption—55-C-1883) • •

This cause coming on for disposition of the motion of Parmelee Transportation Company for leave to intervene as defendant and for hearing on the plaintiff's motion for defendants to show cause why restraining order should not be continued or made permanent come the parties by their counsel and upon due consideration the Court being fully advised in the premises it is

Ordered that the motion of Parmelee Transportation Company to intervene be and the same hereby is sustained and the Court now having heard the arguments of counsel on the plaintiff's motion for a rule to show cause why a restraining order should not be continued or made permanent said motion hereby is taken under advisement and it is

Further Ordered that leave be and hereby is granted to Parmelee Transportation Company to file brief on or before noon, November 15, 1955 and that leave be and hereby is granted to the plaintiff to reply on or before November 17, 1955:

248 And on the same day, to wit, on the 10th day of November, 1955, being one of the days of the regular November term of said Court, in the record of proceedings thereof, in said entitled cause, before the Honorable Walter J. La Buy District Judge, appears the following entry, to wit:

249 IN THE UNITED STATES DISTRICT COURT.
 * * (Caption—55-C-1883) * *

ORDER EXTENDING TEMPORARY RESTRAINING ORDER.

This cause coming on now to be heard upon the rule to show cause why the relief prayed for in the Complaint herein should not be granted, and all parties having appeared in open court and having consented that the temporary restraining order entered by this Court be extended until the Court enters an order disposing of the application for preliminary injunction, and the Court being now fully advised in the premises:

It Is Hereby Ordered that the expiration date of the Temporary Restraining Order heretofore entered by this Court in the above-captioned cause on Monday, October 24, 1955 A. D., and extended until November 10, 1955 A. D., at 10:00 P. M. by Order entered November 7, 1955 A. D., be, and the same hereby is, extended until the Court enters an order disposing of the application for preliminary in-

junction; and that the defendants, and each of them, their agents, servants, employees, officers and attorneys, be restrained as aforesaid according to the provisions of the aforesaid order of October 24, 1955, which said provisions are incorporated herein by reference as fully as if specifically set forth verbatim herein;

250 It Is Further Ordered that the Bond heretofore filed in the above-captioned cause stand as the bond to secure the defendants during the period of this Temporary Restraining Order as herein extended.

This Order issued as of 2:00 o'clock P.M., this 10th day of November, 1955 A.D.

/s/ Walter J. La Buy,

United States District Judge.

Chicago, Illinois.

286 And afterwards on, to wit, the 17th day of November, 1955 came the Defendants by their attorneys and filed in the Clerk's office of said Court their certain Motion for Summary Judgment in words and figures following, to wit:

287 IN THE DISTRICT COURT OF THE UNITED STATES.

(Caption—55-C-1883)

MOTION OF DEFENDANTS FOR SUMMARY JUDGMENT.

Now come the defendants City of Chicago, a municipal corporation, Richard J. Daley, as Mayor of said City; John C. Melaniphy, Acting Corporation Counsel of said City; Timothy J. O'Connor, as Commissioner of Police of said City and William P. Flynn, as Public Vehicle License Commissioner of said City, defendants, by John C. Melaniphy, Acting Corporation Counsel and Joseph F. Grossman, Special Assistant Corporation Counsel of the City of Chicago, attorneys for said defendants and move the court for a summary declaratory judgment, pursuant to Rule 56 of the Federal Rules of Civil Procedure to determine:

1. Whether plaintiff, Railroad Transfer Service, Inc., is a public utility under the laws of Illinois; ..

2. Whether said plaintiff, by virtue of its contract with plaintiff railroad companies, is operating its vehicles within the city of Chicago exclusively as agent for and in behalf of plaintiff railroads as public utilities under the laws of Illinois;

3. Whether said plaintiff's operations are confined to the transportation of passengers on through route railroad and steamship transportation tickets between points outside of the corporate limits of the city in intrastate 288 and interstate commerce;

4. Whether said plaintiff operates any vehicle on any public way for the transportation of passengers for hire from place to place within the corporate limits of the city, as provided in Section 23-2 of the Municipal Code of Chicago;

5. Whether said plaintiff is operating terminal vehicles within the city of Chicago, as defined in Section 28-1 of the Municipal Code of Chicago, as amended July 26, 1955;

6. Whether any of said plaintiff's operations are in local transportation of passengers at rates of fare subject to Section 28-31.2 of the Municipal Code of Chicago, as amended July 25, 1955;

7. Whether any of said plaintiff's operations are subject to any of the provisions of Chapter 28 of the Municipal Code of Chicago. In support of said motion, defendants state that there is no genuine issue as to any material fact contained in the complaint and that these defendants are entitled to judgment as a matter of law whether Chapter 23 of the Municipal Code of Chicago, as amended July 26, 1955, is applicable to the operations of plaintiff, Railroad Transfer Service, Inc.

John C. Melaniphy,
Acting Corporation Counsel,

Joseph F. Grossman,
*Special Assistant Corporation
Counsel,
Attorneys for Defendants.*

290

IN THE UNITED STATES DISTRICT COURT.

• • (Caption—55-C-1883) • •

TRANSCRIPT OF PROCEEDINGS

had on the hearing of the above-entitled cause before the Honorable Walter J. LaBuy, one of the judges of said court, in his courtroom in the United States courthouse at Chicago, Illinois, on November 17th, 1955, at 10:15 o'clock a. m.

292 Mr. Grossman: If the Court please, the City's meeting is due today and I have prepared and am filing a motion for summary, declaratory judgment, because there are no issues of fact involved. A contract is a part of the complaint. The ordinances of the City of Chicago are part of the complaint, and there is only one question of law involved, and that is whether the ordinances apply to the operations indicated by the contract which is a part of the complaint.

294 Now, this motion must be filed ten days before the hearing, and I am asking for a hearing to be set on this motion on November 28, 1955, under the rules of the Civil Practice Act, or under the rules of this Court or at such time, later time as is more convenient for the Court.

302 Mr. Grossman: Yes.

Mr. Freeman: Yes, he does..

Mr. Grossman: But the question is, does this ordinance apply?

Mr. Freeman: We have argued that too.

The Court: Well, it is the Court's view that the City should be permitted to file its motion, and the Court will consider the motion for the judgment in conjunction with the motion for a restraining order, and I don't see any reason why there has to be the delay that is referred to here. You are all familiar with the question and have submitted your briefs already on the pending motion. Now why can't you shorten the time?

Mr. Grossman: I am perfectly willing to shorten the time.

The Court: Your briefs could stand on this motion too, unless you have something further to add.

Mr. Goldstein: Well, there are some questions in here, and we suggested next Tuesday.

303 Mr. Freeman: That is all right with me.

Mr. Grossman: We wish to be excused from filing briefs.

Mr. Goldstein: When will you file your brief?

Mr. Freeman: I won't file any more brief. I filed mine.

The Court: You submit them by Monday and the Court will take it under advisement and notify counsel through memorandum.

360 And on the same day, to wit, the 21st day of November, 1955 came the Plaintiffs by their attorneys and filed in the Clerk's office of said Court their certain Exhibit No. 1 (Affidavit of E. B. Padrick) in words and figures following, to wit:

361 IN THE UNITED STATES DISTRICT COURT.
(Caption—55-C-1883)

PLAINTIFFS' EXHIBIT NO. 1.

Affidavit of E. B. Padrick.

State of Illinois, }
County of Cook. } ss.

E. B. Padrick, being first duly sworn, deposes and states:

He is now and has been for seven (7) years Chairman of the Transcontinental Passenger Association and of the Western Passenger Association with offices at Room 436, Union Station Building, Chicago 6, Illinois. These are railroad rate conferences approved by the Interstate Commerce Commission under Section 5a of the Interstate Commerce Act. He is tariff publishing agent for various railroads, acting as such for issuing carriers under powers of attorney on file with the Interstate Commerce Commission and with the Illinois Commerce Commission.

362 Attached hereto as Exhibit A is a true and correct copy of rule No. 14 of joint passenger tariff No. 270, covering passenger fares for travel by railroad and rules and regulations relating thereto, Interstate Commerce Commission No. 4, issued by H. P. Bronson, Agent, on March 3, 1916, effective April 8, 1916, filed with the Interstate Commerce Commission.

Rule No. 14 provides for transfer between Chicago stations of passengers holding tickets for travel originating and terminating outside of Chicago and their hand baggage.

Attached hereto as Exhibit B is a true and correct copy of Rule No. 13, Item (a), of Supplement No. 6 to Chicago Joint Passenger Tariff No. 288-W, covering passenger fares for travel by railroad and rules and regulations relating thereto, Interstate Commerce Commission No. 5398, Illinois Commerce Commission No. 2033, issued by E. B. Padrick, Agent, on August 29, 1955, effective October 1, 1955, filed with the Interstate Commerce Commission and with the Illinois Commerce Commission.

Rule No. 13, Item (a), provides for transfer between Chicago Stations of passengers holding tickets for travel originating outside and terminating outside of Chicago and their hand baggage.

Before 1916, and ever since 1916, and to the present date, all railroad passenger tariffs covering sale of railroad tickets for travel originating outside and terminating outside of Chicago and passing through Chicago have
363 provided for transfer of passengers and their hand baggage in a manner similar to that shown in the said Exhibits A and B.

E. B. Padrick.

Subscribed and sworn to before me this 21st day of November, 1955.

(Notary Seal)

A. F. Hucksold,
Notary Public, Cook
County, Illinois.

364

Exhibit A.

Transfer at Chicago.

14. Where transfer is required in Chicago, all fares in excess of 75 cents, include transfer charge; when the fare is less than 75 cents, transfer charge of 50 cents shall be added, not to exceed a maximum basing fare of 75 cents, which includes transfer, except that—

Via Goodrich Transportation Co., or Graham & Morton Transportation Co., 50 cents should be added to the fares named herein in constructing through fares to cover transfer charge at Chicago, from railway depot to steamer dock. No addition is necessary account of transfer via Northern Michigan Transportation Co., or Northern S. S. Co.

Omnibus transfers are required in Chicago between all depots except between the following lines occupying the same depots jointly.

No transfer between:

Union Passenger Station, Corner Canal and Adams Streets.

Burlington Route.

Chicago, Milwaukee & St. Paul Ry.

Chicago & Alton R. R.

Pennsylvania Line (Pan Handle Route).

Pennsylvania Line (Fort Wayne Route).

No transfer between:

Dearborn Station, Corner Polk and Dearborn Streets.

Atchison, Topeka & Santa Fe Ry.

Chesapeake & Ohio Ry. Co. of Indiana.

Chicago & Eastern Illinois R. R.

Chicago, Indianapolis & Louisville Ry.

Erie R. R.

Grand Trunk Ry. System.

Wabash Railway.

365

No transfer between:

Central Station, Corner Park Row and Twelfth Street (Michigan Avenue).

Cleveland, Cincinnati, Chicago & St. Louis Ry.

Illinois Central R. R.

Michigan Central R. R.

No transfer between:

Grand Central Station, Corner Harrison Street and Fifth Avenue.

Baltimore & Ohio R. R.

Chicago Great Western R. R.

Minneapolis, St. Paul & Sault Ste. Marie Ry. (Soo Line).

Pere Marquette System.

No transfer between:

La Salle St. Station, Corner La Salle and Van Buren Streets.

Chicago, Rock Island & Pacific Ry.

New York Central R. R. (Line West of Buffalo).

New York, Chicago & St. Louis R. R.

367 And on the same day, to wit, the 21st day of November, 1955 came the Plaintiffs by their attorneys and filed in the Clerk's office of said Court their certain Exhibit No. 2 (Affidavit of E. B. Padrick) in words and figures following, to wit:

368 IN THE UNITED STATES DISTRICT COURT.
* * (Caption—55-C-1883) * *

PLAINTIFFS' EXHIBIT NO. 2.

Affidavit of E. B. Padrick.

State of Illinois, }
County of Cook. } ss.

E. B. Padrick, being first duly sworn, deposes and states:

Attached hereto are copies of letters written by him to the Interstate Commerce Commission and to the Illinois Commerce Commission, advising such Commissions: (1) of the discontinuance of arrangements for transfer service in Chicago between the Chicago terminal railroads and Parmelee Transportation Co., and (2) of the execution of the contract for such transfer service between the railroads and Railroad Transfer Service, Inc., for five years beginning October 1, 1955.

369 Copies of such contract were transmitted with such letters.

E. B. Padrick.

Subscribed and sworn to before me this 21st day of November, 1955.

(Notary Seal)

A. F. Hucksold,
Notary Public, Cook County,
Illinois.

370

Chicago Terminal Lines,
Room 436 Union Station,
516 West Jackson Boulevard,
Chicago 6, Illinois.

September 19, 1955.

Interstate Commerce Commission,
Washington 25, D. C.

Gentlemen:

On June 13, 1955, acting as agent for the twenty-one (21) Chicago Terminal Railroads handling passengers to, from, and through Chicago, I sent a letter to the Chairman of the Board, Parmelee Transportation Company, as follows:

"As agent for the Chicago Terminal Railways now doing business with you in connection with the transfer of passengers and baggage between stations in Chicago, I have been directed to inform you that, effective with the close of business, September 30, 1955, those railroads will no longer require the services of the Parmelee Transportation Company.

"I have also been directed on behalf of these railroads to inform you that if for any reason whatsoever there is a curtailment of service on the part of Parmelee Transportation Company prior to that time, your services will be terminated immediately."

On the same date, I wrote another letter to Mr. J. L. Keeshin, indicating that the twenty-one (21) Chicago Terminal Railroads would enter into a five-year contract with them, such letter reading as follows:

"As agent for the Chicago Terminal Railways that require the transfer of passengers and baggage between stations in Chicago, I have been directed to inform you that effective with the start of business October 1, 1955, those railroads will accept your proposal in principle.

"I have been directed to negotiate the proposed five-year contract with you, on behalf of the Chicago Terminal Railways, and it will be appreciated if you will furnish me with three copies of a draft of contract, after which, time we will be glad to go over it with you for any changes, additions, or deletions that might be necessary.

"I also understand that if, for any reason whatsoever, there is a curtailment of service on the part of the present operator, you are willing to establish service immediately.

371 "We shall be glad to work directly with you and assist all possible in ironing out any of the details with respect to your establishment of this service.

"Will you please acknowledge."

You will find attached, for your files, a copy of the agreement between Railroad Transfer Service, Inc., and the Chicago Terminal Railroads and Depot Companies.

Yours truly,

s/ E. B. Padrick,

Agent.

l/br/ac

Attachment.

372 Chicago Terminal Lines,
Room 436 Union Station,
516 West Jackson Boulevard,
Chicago 6, Illinois.

September 19, 1955.

Illinois Commerce Commission,
Springfield, Illinois.

Gentlemen:

On June 13, 1955, acting as agent for the twenty-one (21) Chicago Terminal Railroads handling passengers to, from, and through Chicago, I sent a letter to the Chairman of the Board, Parmelee Transportation Company, as follows:

"As agent for the Chicago Terminal Railways now doing business with you in connection with the transfer of passengers and baggage between stations in Chicago, I have been directed to inform you that, effective with the close of business, September 30, 1955, those railroads will no longer require the services of the Parmelee Transportation Company.

"I have also been directed on behalf of these railroads to inform you that if for any reason whatsoever there is a curtailment of service on the part of Parmelee Trans-

portation Company prior to that time, your services will be terminated immediately."

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"As agent for the Chicago Terminal Railways that require the transfer of passengers and baggage between stations in Chicago, I have been directed to inform you that effective with the start of business October 1, 1955, those railroads will accept your proposal in principle.

"I have been directed to negotiate the proposed five-year contract with you, on behalf of the Chicago Terminal Railways, and it will be appreciated if you will furnish me with three copies of a draft of contract, after which time we will be glad to go over it with you for any changes, additions, or deletions that might be necessary.

"I also understand that if, for any reason whatsoever, there is a curtailment of service on the part of the present operator, you are willing to establish service immediately.

"We shall be glad to work directly with you and assist all possible in ironing out any of the details with respect to your establishment of this service.

"Will you please acknowledge."

373 You will find attached, for your files, a copy of the agreement between Railroad Transfer Service, Inc., and the Chicago Terminal Railroads and Depot Companies.

Yours truly,
s/ E. B. Padrick,
Agent.

l/br/ac
Attachment.

374 And on the same day, to wit, the 21st day of November, 1955 came the Plaintiffs by their attorneys and filed in the Clerk's office of said Court their certain Exhibit No. 3 in words and figures following, to wit:

375 **PLAINTIFFS' EXHIBIT NO. 3.**

An Ordinance

Granting Permission and Authority for the Operation of Terminal Vehicles Within the City of Chicago.

Be It Ordained By The City Council Of The City Of Chicago:

Section 1. Definitions. When used in this ordinance:

"City" means the City of Chicago.

"Commissioner" means the Public Vehicle License Commissioner of the City of Chicago, or any officer or officers vested by ordinance with authority to perform the function involved in the context in which the word is used.

"Licensee" means a qualified person, firm or corporation who has filed with the City Clerk formal written acceptance of this ordinance.

"Terminal vehicle" means a public passenger vehicle licensed as such which is operated exclusively for the transfer of passengers to and from terminal stations of railroad and steamship companies.

Section 2. Subject to all the conditions of this ordinance, exclusive permission and authority is hereby granted to the licensee to operate terminal vehicles in the City for a period of ten (10) years, commencing on _____, 1955, and ending on _____, 1965.

Section 3. Licensee shall be subject to all laws and ordinances relating to the operation of motor vehicles and the regulation of traffic, and all ordinances relating to public passenger vehicles affecting terminal vehicles, and all reasonable rules and regulations of the commissioner relating thereto.

Section 4. It is unlawful for any person to be an operator of one or more terminal vehicles on any public
376 **way from place to place within the corporate limits of the city unless such terminal vehicles are licensed**

by the City as terminal vehicles. No person shall be qualified for a terminal vehicle license and a taxicab license at the same time.

Section 5. Application for a terminal vehicle license shall be made in writing signed and sworn to by the applicant upon forms provided by the commissioner.

Section 6. No vehicle shall be licensed as a terminal vehicle until it has been inspected under the direction of the commissioner and found to be in safe operating condition and to have adequate body and seating facilities which are clean and in good repair for the comfort and convenience of passengers.

Section 7. In addition to motor vehicle taxes and inspection fees imposed by State law and City ordinances, licensee shall pay to the City quarterly in advance, on the first day of January, April, July, and October, dollars for each terminal vehicle as compensation for the use of city streets and other public ways by authority of this ordinance.

Section 8. Notwithstanding the requirements of any law or ordinance relating to the filing of bonds and policies of insurance against liability for injury to or death of any person, or for damage to property, by any person operating any terminal vehicle, licensee, as a prerequisite to the issuance of its license and the continuing validity of the same, shall carry public liability and property damage insurance and workmen's compensation insurance for his employees with solvent and responsible insurers approved by the commissioner, authorized to transact such insurance business in the State of Illinois, and qualified to assume the risk for the amounts hereinafter 377 set forth under the laws of Illinois, conditioned to pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages because of bodily injury, sickness or disease, including death, at any time resulting therefrom, sustained by any person arising out of the ownership, maintenance or use of any of licensee's terminal vehicles.

The public liability insurance policy or contract may cover one or more public passenger vehicles, but each vehicle shall be insured for the sum of at least five thousand dollars for property damage and fifty thousand dollars for injuries to or death of any one person, and one hundred thousand dollars for injuries to or death of

more than one person in any one accident. Every insurance policy or contract for such insurance shall provide for the payment and satisfaction of any final judgment rendered against the cabman and person insured, or any person driving any insured vehicle, and that suit may be brought in any court of competent jurisdiction upon such policy or contract by any person having claim arising from the operation or use of such vehicle. It shall contain a description of each public passenger vehicle insured, the manufacturer's name and number, the state license number and the public passenger vehicle license number.

In lieu of an insurance policy or contract a surety bond or bonds with a corporate surety or sureties authorized to do business under the laws of Illinois, may be accepted by the commissioner for all or any part of such insurance; provided that each bond shall be conditioned for the payment and satisfaction of any final judgment in conformity with the provisions of an insurance policy required by this section.

All insurance policies or contracts or surety bonds required by this section, or copies thereof certified by the insurers or sureties, shall be filed with the commissioner and no insurance or bond shall be subject to cancellation

except on thirty days' previous notice to the commissioner. If any insurance or bond is cancelled or permitted to lapse for any reason, the commissioner shall suspend the license for the vehicle affected for a period not to exceed thirty days, to permit other insurance or bond to be supplied in compliance with the provisions of this section. If such other insurance or bond is not supplied within the period of suspension of the license, the Mayor shall revoke the license for such vehicle.

Section 9. All judgments and awards rendered by any court or commission of competent jurisdiction for loss or damage in the operation or use of any terminal vehicle shall be paid by licensee within ninety (90) days after they shall become final and not stayed by supersedeas. This obligation is absolute and not contingent upon the collection of any indemnity from insurance carried by licensee.

Section 10. Licensee shall file with the commissioner an address in the City to which all notices required to be given to licensees under this ordinance may be addressed. All such notices shall be deemed good and sufficient for

all purposes when deposited in the United States mail properly addressed with first class postage prepaid.

Section 11. Upon the effective date of this ordinance the commissioner shall issue licenses hereunder to licensee in not to exceed the number of licenses held by such licensee on April 1, 1955. If, during the term of this contract ordinance additional service of the type provided by terminal vehicles becomes necessary, the commissioner shall notify licensee to provide such additional service and shall issue additional vehicle licenses to such licensee upon application therefor. The question of whether additional vehicles are necessary shall be determined by the commissioner only after a count of passengers at the terminals being served indicates a need for such additional vehicles.

379 Section 12. Within five (5) days after this ordinance shall become effective, and provided licensee has filed applications for the licensing of its terminal vehicles, and has satisfied all of the conditions of this ordinance, licensee may then file with the City Clerk an unconditional written acceptance of this ordinance. Upon such filing, this ordinance shall become effective as a contract between the City and the licensee for the term specified and thereupon the commissioner shall issue licenses as hereinbefore provided.

Section 13. The invalidity of any section or part of any section of this ordinance shall not affect the validity of any other section or part thereof.

Section 14. All of Sec. 28-31, and that portion of Sec. 28-1 and 28-7 defining or referring to "terminal vehicles," of Chapter 28 of the Municipal Code of Chicago, as amended December 20, 1951 and January 30, 1952, is repealed.

Section 15. This ordinance shall be effective upon its passage and approval.

Paul M. Shenedon,
Alderman, 16th Ward.

380 State of Illinois, }
County of Cook. } ss.

I, John C. Marcin, City Clerk of the City of Chicago in the County of Cook and State of Illinois, Do Hereby Certify that the annexed and foregoing is a true and correct copy of a proposed ordinance regulating the operations of terminal vehicles in the City of Chicago, referred to the Committee on Local Transportation by the City Council at its meeting held on the sixteenth (16th) day of June, A. D. 1955, which said proposed ordinance is filed with City Clerk's Document No. 454221 (ordinance passed by the City Council on the twenty-sixth (26th) day of July, A. D. 1955, prescribing new regulations for the operation of terminal vehicles within the City of Chicago).

I Do Further Certify that the original of said proposed ordinance is on file in my office and that I am the lawful custodian of the same.

In Witness Whereof, I have hereunto set my hand and affixed the corporate seal of the City of Chicago aforesaid, at the said City, in the County and State aforesaid, this fifteenth (15th) day of November, A. D. 1955.

John C. Marcin,
City Clerk

(Seal)

381 And on the same day, to wit, the 21st day of November, 1955, came the Plaintiffs by their attorneys and filed in the Clerk's office of said Court their certain Exhibit No. 4, in words and figures following, to wit:

382 PLAINTIFFS' EXHIBIT NO. 4.

Excerpt.

City Council.
Committee on Local Transportation.
City Hall,

July 21, 1955,

2:30 p. m.

383 Chairman Sheridan: Very well. We will proceed with the next matter on the agenda.

Item No. 2 is the proposed ordinance granting authority for and licensing the operation of terminal vehicles within the City of Chicago.

I want to say at this time for the benefit of the members of the Committee and all who are present that a few weeks ago, as Chairman of the Committee on Transportation, I was advised by the vehicle licensing commissioner that he had received a communication from the Parmelee Company who operate terminal vehicles in Chicago to serve the railroads, that the contract that existed between the railroads and Parmelee was to be cancelled out effective, I believe, sometime in September, so, as Chairman of the Committee, I assume that that meant that that particular service was either going to be discontinued or another agency was going to be substituted to perform that service, and in thinking the thing over very seriously, I came to the conclusion that it appeared to me that the railroads, by virtue of the fact that they enter into a contract with the terminal vehicle operators, were taking the position that they

384 were going to dictate to the City of Chicago who was to operate the terminal vehicles in the City of Chicago, and I didn't think that that was the right thing to do. I think that the City has the obligation to see that we have proper facilities for that operation, and the history of the Parmelee Company in the past has been very good as far as the transportation committee is concerned, and also the service to the people of the City of Chicago.

Not knowing what type of service was to be substituted or whether it was to be eliminated, I proposed an ordinance with the assistance of Ralph Gross and our Staff and presented it to the City Council, and had it sent to this Committee. I discussed the proposed ordinance which we are to consider here today with Mr. Grossman, and it appears—and I am perfectly willing to admit it—that probably my intentions were of the very best and that I was on the right track, at least, but probably my method of approach was not right, because the ordinance we are considering Mr. Grossman objects to in some certain provisions.

However, I do think that whether this is the avenue we should use to accomplish our purpose or not, we should 385 still find some way to accomplish the purpose by an amendment to the existing ordinance or a repeal of the existing ordinance, or some such way, and I am asking Mr. Grossman if he will comment on this after the discussion that I have had with him.

Alderman Burke: Would you read the ordinance.

Chairman Sheridan: Well, it's rather a lengthy document, Joe.

Mr. Grossman: The ordinance that was presented to me for consideration yesterday, or the day before yesterday, I examined very carefully, and I don't think that it is within the corporate power of the City of Chicago, but the objective can be obtained in some other way, I think, without conflicting with our charter powers, and I had a conference with some of the members this afternoon, and proposed an approach which I think we can work out between now and the next meeting of the City Council.

Chairman Sheridan: Well, the next meeting of the City Council, of course, is next Tuesday, and we are going to adjourn from next Tuesday until after Labor Day. I would certainly very much appreciate and desire to have some such ordinance or amendment to the existing ordinance 386 prepared so we can consider a way to cover this particular proposition.

Mr. Grossman: I think that we will be able to do that between now and Tuesday.

Chairman Sheridan: Well, may I suggest to the members of the Committee then that we recess this meeting until, say, 9:00 o'clock Tuesday morning, and consider the ordinance—the suggestions that you will bring in.

Mr. Grossman: I will have an ordinance prepared.

Alderman Burke: I second the motion.

Chairman Sheridan: Is there anybody who wants to comment on this or add anything to the discussion?

Alderman Holman: One question. Do I understand that terminal vehicles embrace those vehicles that operate between railroad stations?

Chairman Sheridan: Yes.

Alderman Holman: Is it limited to that?

Mr. Grossman: No, it is not. The operation from the railroad stations to points within the central business district, which is defined as the area bounded on the North by Ohio Street and on the South by Roosevelt Road, and the Lake on the East and Canal Street on the West. It is in the railroad terminal area, but it isn't necessarily between railroad stations. It may go from railroad stations to hotels and from hotels to railroad stations. That is the operation.

Alderman Holman: Thank you.

Mr. Grossman: And that operation can be continued by amendments to the present ordinance without conflicting with any of the statutory provisions.

Chairman Sheridan: Will you be kind enough to get that prepared for us?

Mr. Grossman: Yes.

Alderman Johnson: May I ask a question.

Chairman Sheridan: Yes.

Alderman Johnson: These vehicles carry passengers or baggage?

Mr. Grossman: This is public passenger vehicles.

Alderman Johnson: The old system where you get off the train and go to the hotel?

Mr. Grossman: Yes.

Alderman Burke: Is this a service that has been available to the travellers for some 60, 70, or 80 years?

Chairman Sheridan: It is my understanding they have been in existence in the City of Chicago for 103 years.

The Committee will go into executive session, then, and resolve the other question.

388 Thank you all for your attention.

(Whereupon, the meeting was adjourned.)

389 State of Illinois, }
County of Cook. } ss.

James P. Dolan, being first duly sworn, on oath says that he is a court reporter doing business in the City of Chicago; that he reported in shorthand the testimony and colloquy given at the meeting of the Committee on Local Transportation, July 21, 1955, at the City Hall, Chicago, Illinois; that the foregoing is a true and correct transcript of his shorthand notes so taken as aforesaid, and contains an excerpt of the testimony and colloquy given at the said meeting.

James P. Dolan.

Subscribed and sworn to before me this 18th day of November, A. D. 1955.

Julian K. Hall,

Notary Public.

(Notary Seal)

390 And on the same day, to wit, the 21st day of November, 1955, came the Plaintiffs by their attorneys and filed in the Clerk's office of said Court their certain Exhibit No. 5, in words and figures following, to wit:

391 PLAINTIFFS' EXHIBIT NO. 5.

Minutes of the Committee on Local Transportation.

Meeting held Thursday, July 21, 1955 at 2:30 p. m.

Quorum present.

The committee then took up for consideration item No. 2 on the agenda—a proposed ordinance granting authority for and licensing the operation of terminal vehicles within the City of Chicago.

Chairman Sheridan stated that recently he was advised by the Vehicle License Commissioner that he had received a communication from the Parmelee Transportation Company advising that its contract with the railroads was to be cancelled out in September of this year, which would make it appear that the railroads were taking the position of dictating who would or could operate terminal vehicles in Chicago; that he did not think that was right and had

prepared an ordinance with the assistance of Mr. Gross, and had it introduced in the City Council and referred to the committee; that subsequently, he had discussed said ordinance with Mr. Grossman of the Corporation Counsel's office and that as a result of his conference with Mr. Grossman, it would appear that while he—Chairman Sheridan—was on the right track in the matter, his method of approach was wrong.

Mr. Grossman, who was present at the request of the committee, stated that he had looked over the ordinance as introduced by Chairman Sheridan and is of the opinion that the ordinance is not in proper form; but that he believes the objective can be obtained in some other way. He said he would endeavor to prepare and submit an ordinance on this subject to the committee before the next meeting.

At the suggestion of Chairman Sheridan, the committee voted to hold a recessed session Tuesday morning, July 26, 1955, at 9:00 o'clock, for the purpose of considering such ordinance as Mr. Grossman may submit.

The meeting was then recessed until Tuesday morning, July 26, 1955 at 9:00 o'clock.

John C. Marcin,

City Clerk,

By William F. Harrah,

Committee Secretary.

392 State of Illinois, }
County of Cook. } ss.

I, John C. Marcin, City Clerk of the City of Chicago in the County of Cook and State of Illinois, Do Hereby Certify that the annexed and foregoing is a true and correct excerpt from the minutes of the proceedings of the Committee on Local Transportation of the City Council of the City of Chicago had at a meeting of said committee held on twenty-first (21st) day of July, A. D. 1955, at 2:30 P.M., now on file in my office.

I Do Further Certify that the original of said minutes, of which the foregoing is a true copy, is entrusted to my care for safe keeping and that I am the lawful custodian of the same.

In Witness Whereof, I have hereunto set my hand and affixed the corporate seal of the City of Chicago aforesaid, at the said City, in the County and State aforesaid, this fifteenth (15th) day of November, A. D. 1955.

/s/ John C. Marcin,
City Clerk.

(Seal)

393 And on the same day, to wit, the 21st day of November, 1955 came the Plaintiffs by their attorneys and filed in the Clerk's office of said Court their certain Exhibit No. 6 in words and figures following, to wit:

394 PLAINTEFFS' EXHIBIT NO. 6.

Minutes of the Committee On Local Transportation.
 Recessed Session held Tuesday, July 26, 1955 at 9:00 a.m.

Quorum present.

Chairman Sheridan stated that this recessed session was being held to receive a report from Mr. Grossman on the proposed ordinance (referred June 16, 1955) granting authority for and licensing the operation of terminal vehicles within the City of Chicago. He said that Mr. Grossman had prepared a substitute ordinance which would accomplish what the committee had in mind, namely, placing the licensing and operation of terminal vehicles under the complete control of the City of Chicago, whereas as the Code now provides, the only one who can secure a license for the operation of a terminal vehicle is someone who has a contract with the railroads.

Alderman Burmeister moved that the committee recommend to the City Council that it pass the proposed substitute ordinance drafted by Mr. Grossman.

Alderman McGrath seconded the motion.

The motion prevailed.

John C. Marcin,

City Clerk.

By Wm. E. Harrah,

Committee Secretary.

395 State of Illinois, }
County of Cook. } ss.

I, John C. Marcin, City Clerk of the City of Chicago in the County of Cook and State of Illinois, Do Hereby Certify that the annexed and foregoing is a true and correct copy of the minutes of the proceedings of the Committee on Local Transportation of the City Council of the City of Chicago had at a recessed session of said committee held on the twenty-sixth (26th) day of July, ~~A. D. 1955~~, at 9:00 A.M., now on file in my office.

I Do Further Certify that the original of said minutes, of which the foregoing is a true copy, is entrusted to my care for safekeeping and that I am the lawful custodian of the same.

In Witness Whereof, I have hereunto set my hand and affixed the corporate seal of the City of Chicago aforesaid, at the said City, in the County and State aforesaid, this fifteenth (15th) day of November, A. D. 1955.

/s/ John C. Marcin,

(Seal)

City Clerk.

396 And on the same day, to wit, the 21st day of November, 1955 came the Plaintiffs by their attorneys and filed in the Clerk's office of said Court their certain Exhibit No. 7 (Affidavit of Edwin A. Wahlen) in words and figures following, to wit:

397 IN THE UNITED STATES DISTRICT COURT.

(Caption—55-C-1883)

PLAINTIFFS' EXHIBIT NO. 7.

Affidavit of Edwin A. Wahlen.

398 State of Illinois,)
County of Cook. } ss.

Edwin A. Wahlen, being first on oath duly sworn, states as follows:

1. I am a practicing lawyer in Chicago, Illinois, associated with the law firm of Haight, Goldstein & Haight, with offices at 209 South La Salle Street, Chicago, Illinois. I have been associated with Mr. Benjamin F. Goldstein of that law firm in matters involving Railroad Transfer Service, Inc., including the litigation now pending before the Honorable Walter J. LaBuy, District Judge, in the United States District Court in Chicago, Illinois, Case No. 55 C 1883.

2. On September 9, 1955, I went in person to the office of the Chairman of the Committee on Local Transportation of the City Council of the City of Chicago (hereinafter referred to as "Committee"). A Miss O'Connell was in charge of that office at that time, and I obtained from her a blue covered typewritten transcript of the proceedings of a meeting of the Committee held on July 21, 1955 (hereinafter referred to as "Transcript"), which showed on its cover that it had been prepared by Sullivan Reporting Company (hereinafter referred to as "Sullivan"). I copied in my own handwriting portions of the Transcript and then returned the Transcript to Miss O'Connell.

I then went in person to the office of the City Clerk of the City of Chicago and obtained from a clerk in that office the original of the proposed Ordinance covering Terminal

Vehicles which was presented to the City Council on June 16, 1955, by Alderman Paul Sheridan, and on that date referred by the City Council to the Committee (hereinafter referred to as "Abandoned Ordinance"). I copied in my own handwriting portions of the Abandoned Ordinance and then returned it to the clerk from whom I had received it.

I then returned to my office and had a secretary make typewritten copies of my transcriptions of the Transcript and of the Abandoned Ordinance. Mr. Albert J. Meserow, one of the Counsel for Railroad Transfer Service, Inc., at the oral argument in support of the temporary injunction read into the record on November 10, 1955, at pages 25 to 30, inclusive, of the transcript for that date, a portion of my typewritten copy of the Abandoned Ordinance and my typewritten copy of a portion of the Transcript.

3. On November 14, 1955, I went in person to the office of the City Clerk of the City of Chicago and ordered 400 from Miss Cooper of that office certified copies of the Abandoned Ordinance and of the portion of the Transcript, which had been made available to me on September 9, 1955, and which I had copies in my own handwriting. I handed her a typewritten copy of my transcriptions of the Transcript and of the Abandoned Ordinance.

4. On November 15, 1955, Miss Cooper notified me by telephone that the typewritten copy of the portion of the Transcript which I had left with her was not the Official Minutes of the Committee meeting of July 21, 1955; that under the direction of the Secretary of the Committee a summary of the Transcript was prepared which became the Official Minutes of the meeting; and that only the Official Minutes could be certified by the City Clerk. I instructed her to prepare certified copies of the Official Minutes of the portion of the Committee meeting of July 21, 1955, covering public passenger vehicles.

5. On November 16, 1955, I was notified by Miss Cooper on the telephone that the certified copies were ready.

6. On November 17, 1955, I went to her desk in the City Clerk's office and she handed me three certified copies of:
 (a) an extract of the Official Minutes of the Committee meeting of July 21, 1955;

401 (b) the Official Minutes of the Committee meeting of July 26, 1955; and

(c) the Abandoned Ordinance, one copy of each of which

documents is attached hereto as Exhibits 1, 2 and 3, respectively.

I asked Miss Cooper the reason for the discrepancy between the Transcript of the Committee meeting of July 21, 1955, and the Official Minutes. She called Mr. William F. Harrah, whom she said was the Committee Secretary, on the telephone to explain the reason to me. He told me that the Official Minutes are a summary of the Transcript and that Sullivan was the only person from whom I could obtain a certified copy of the Transcript.

7. On November 18, 1955, I went in person to Sullivan's Office, Room 1405, One North La Salle Street, Chicago, Illinois, and obtained from Mr. James Dolan, the reporter who acted as the reporter at the Committee's meeting on July 21, 1955, six certified copies of an extract of the Transcript of that meeting, one copy of which is attached hereto as Exhibit 4.

Edwin A. Wahlen.

Subscribed and sworn to before me this 21st day of November, 1955.

(Notary Seal)

A. F. Hucksold.

419 And afterwards on, to wit, the 12th day of December, 1955 there was filed in the Clerk's office of said Court a certain Memorandum in words and figures following, to wit:

420 IN THE UNITED STATES DISTRICT COURT.
* * (Caption—55-C-1883) * *

MEMORANDUM.

The above cause is before the court on two motions: (1) a motion for summary judgment filed on behalf of the City of Chicago, and (2) a motion for temporary injunction filed by the plaintiffs.

These motions are based on the plaintiffs' complaint for declaratory judgment, together with the documents and exhibits attached thereto; on affidavits and exhibits submitted by the plaintiffs and the defendant-intervenor; and hearings had before the court. No answers have been filed

to the complaint by either the City of Chicago or Parmalee, although Parmalee's petition for intervention prays that it be considered as an "answer and claim".

In the present state of the record, therefore, the court must refer to the complaint and the petition with respect to the issues which are here presented.

Jurisdiction is premised on § 1331 of the Judicial Code, 28 U.S.C.A., granting to district courts original jurisdiction of civil actions which arise under the Constitution, laws and treaties of the United States and where the matter in controversy exceeds the sum of \$3,000 exclusive of interest and costs, and also on § 1337 of the Judicial Code, 28 U.S.C.A., granting to district courts original jurisdiction of civil actions arising under any act of Congress regulating commerce.

The complaint alleges that plaintiff railroads have filed tariffs with the Interstate Commerce Commission and the Illinois Commerce Commission for through passenger service from points outside of Chicago to points beyond Chicago; that there is a contract between the plaintiff railroads and the plaintiff, Transfer, whereby Transfer carries railroad passengers and their baggage from one Chicago terminal station to another; that before commencing his rail journey the passenger has purchased a through ticket to and beyond Chicago in which is included a coupon good for transportation between the Chicago terminal stations in Transfer's vehicles; that the coupon is surrendered by the passenger when he uses Transfer's vehicles; that the railroad pays Transfer the coupon rate fixed in the contract and the entire expense of the transfer operation is absorbed by the railroads; that more than 99% of all such through passenger service is in interstate commerce; that the power to regulate the manner in which the railroads shall carry out their responsibilities under § 1(3)(a), § 4, and § 3(4) of the Interstate Commerce Act, 49 U. S. C. A., is exclusively vested in the Interstate Commerce Commission and the ordinance is invalid as encroaching upon powers vesting exclusive regulation of this activity in the Interstate Commerce Commission pursuant to "An act to Regulate Interstate Commerce", 49 U. S. C. A. §§ 1 et seq.; that in the alternative the ordinance is invalid as an undue burden on interstate commerce in violation of Article 1, § 8, Clause 3 of the Constitution of the United States for the reason that § 28-31 of the Municipal Ordinance premises the issuance of a license to terminal vehicles upon

public convenience and necessity as determined by the commissioner and upon report to the council which latter body may fix the maximum number of terminal vehicle licenses to be issued not to exceed the number recommended by the commissioner; that the proper exercise of this power by the Commissioner and the City Council requires, as a minimum, the knowledge of all factors which influence

the demand for and supply of suitable passenger 422. vehicles and all the pertinent facts and circumstances in the operation of the railroads which influence the volume of through passengers traveling through Chicago; that practically none of these pertinent facts and circumstances are available to the commissioner and/or city council and the criteria prescribed by § 28.31-1 of the ordinance do not and can not make such pertinent information available to them; that § 28-6 of the ordinance confers sole discretion upon the commissioner to select the class of persons and individuals "qualified" to have public passenger vehicle licenses thereby limiting the number and character of passenger motor vehicles and the number and qualifications of the operators available to the railroads to perform the interstate transfer service they are required by law to provide.

The complaint also alleges that plaintiffs have advised the defendant, City of Chicago, and its officials that the provisions of the ordinance do not apply to the operations covered by contract between the plaintiff railroads and the plaintiff, Transfer, for the reason, (1) the ordinance specifically excepts from its regulation public passenger vehicles which are used in the operation of a public utility under the laws of Illinois; that the railroads which are engaged in the transportation of persons are public utilities within Chapter 111½ §§ 1 et seq., Smith-Hurd Ann. Stats., and that the motor vehicles of Transfer are operated as exclusive agents for said railroads providing the service covered by the public utility law of Illinois; that each of the motor vehicles of Transfer are therefore excepted; and (2) Transfer's passenger vehicle is not intended by the ordinance to be a "terminal vehicle" as defined thereunder in view of the various amendments incorporating changes in that definition and also in the application thereof under earlier ordinances.

The defendant, City of Chicago, has filed a motion for summary judgment requesting the court to determine as a

matter of law whether Chapter 28 of the Municipal Code applies to the operations of the plaintiff, Railroad Transfer Service, Inc. It is a cardinal rule that such motions are granted only in cases where there is no genuine issue of fact involved and where the moving party is entitled to judgment as a matter of law. . .

The petition for intervention, considered as an answer, does not dispute any of the factual allegations of the 423 complaint. In addition, Parmalee in oral argument has admitted that the transportation here involved is in interstate commerce. Parmalee does, however, contend that a dispute exists as to a material fact in that plaintiff railroads state they are required to provide through passenger transportation under the tariffs filed and the applicable statute, whereas Parmalee disagrees. While a dispute does, therefore, exist as to the effect of these tariffs and as to the requirements of the statute regarding through transportation, the court is of the opinion it is not a dispute as to a material fact but a disagreement as to the effect of these tariffs and the interpretation of the statute. This presents only a question of law.

Defendant, City of Chicago, not having filed an answer and having instead filed a motion for summary judgment solely on the basis of the complaint, must be considered to have admitted the truth of the facts alleged therein.

The court is of the opinion that a study of the pleadings, documents and exhibits does not reveal the existence of a dispute as to any of the material facts presented in the complaint. Also, it is not disputed that the transfer operation between railroad terminals is railroad transportation not subject to Part II of the Interstate Commerce Act except for its provisions for Commission regulation "relative to qualifications and maximum hours of service of employees and safety of operations and equipment"; and that Transfer is not a carrier or railroad under Part I of the Interstate Commerce Act.

A federal court has jurisdiction to enjoin the enforcement of statutes which are not authorized as an exercise of police power and which constitute an unlawful burden on interstate commerce. But the power to declare legislative enactments void is one that is exercised cautiously and with reluctance. The presumption is always in favor of the validity of such acts, and the burden of overcoming this strong presumption rests upon the one who challenges it.

The area within which Congress has exercised the power granted to it by the Constitution and the province within which the states have been permitted to encroach thereon by virtue of their police powers has been the subject of controversy in many cases for many years. The guides in judging the validity of state legislation with regard to the exercise of its police powers are discussed in *First Iowa Hydro-Elec. Coop. v. Federal Power Comm.*, (C. A. D. C., 1945) 151 F. (2d) 20, 26, and *First Nat. Bank Ben. Soc. v. Garrison*, (D. C. 1945) 58 F. Supp. 972, 983-985. They are (1) when state and local laws are in conflict with an act of Congress, the law of Congress prevails; (2) when an act of Congress does not clearly prohibit state action but such prohibition is inferable from the scope and purpose of federal legislation, it must be clear that the state legislation is inconsistent with that of Congress in order to render it invalid; (3) when Congress has circumscribed its regulation of interstate commerce to a limited field the intent to supersede the exercise of police power by the state is not implied as to matters not covered by federal legislation; (4) when a state has enacted laws under its police power although they affect interstate commerce, such laws may stand until Congress takes possession of the field under its superior authority to regulate such commerce, but such federal action must be specific in order to be paramount; and (5) Congressional supersedure of local laws is not to be inferred unless clearly indicated by considerations which are persuasive of its intent to do so.

The police power of a state may be delegated to the various municipalities throughout the state, and where such delegation has been made, a municipality, acting as an arm of the state, has power and discretion in passing laws in the public interest. Under Chapter 24, § 23-51, Cities & Villages Act, Smith-Hurd Ann. Stats., the State of Illinois has delegated to the City of Chicago and other municipalities, the power

“to license, tax and regulate hackmen, draymen, omnibus drivers, carters, cabmen, porters, expressmen, and all others pursuing like occupations, and to prescribe their compensation.”

The right and power of the city to regulate the use of its streets by motor vehicles includes the right to impose reasonable conditions and restrictions to promote the general

welfare. And, in accord with the general propositions stated above, such regulation where obviously intended as a police regulation, and not operating unreasonably beyond the occasions of its enactment, is not invalid simply because it may incidentally affect the exercise of some right granted by Congress.

In connection with the application of federal legislation and supervision over the particular activity involved here, it is to be kept in mind that Congress will not be deemed to have superseded or excluded state action under the commerce clause until its intention to do so has been made definite and clear, and where Congress while regulating related matters has not acted on a subject which is peculiarly adapted to local regulation, the state may exert authority concerning such local matters although they indirectly burden interstate commerce. The Interstate Commerce Commission under the authority granted by Congress has not undertaken to exercise any supervision over the specific services performed by Transfer and neither has Congress indicated a clear intention to do so. The Interstate Commerce Commission has not considered this limited and incidental operation as one which it would regulate. *Commercial Zones and Terminal Areas*, (1949) 48 M. C. C. 418; *Status of Parmalee*, (1953) 288 I. C. C. 95; *Exchange of Free Transportation*, (1907) 12 I. C. C. 39; *Anacostia Citizens Assn. v. B. & O.*, (1912) 25 I. C. C. 411; *Michigan Cab Co.*, (1938) 7 M. C. C. 701; *New York Dry Dock Ry. Co. v. Pennsylvania R. Co.*, (C. A. 3, 1933) 63 F. (2d) 1010; Regulations 190.33 and 190.30 (49 C. F. R. §§ 190.33, 190.30).

Admitting this disclaimer of exercise of paramount authority by the Interstate Commerce Commission, the plaintiffs nevertheless insist that § 28-1 and § 28-31 of the Municipal Ordinance contains a potential exercise of discretion to prohibit the "stream of interstate commerce" represented by the transportation of through passengers between railroad terminals and thus invades the exclusive power granted to Congress to regulate interstate commerce.

The pertinent section of the ordinance is § 28-31.1 and provides:

"No license for any terminal vehicle shall be issued except in the annual renewal of such license or upon transfer to permit replacement of a vehicle for that

license unless, after a public hearing held in the same
426 manner as specified for hearings in Section 28-22.1, the Commissioner shall report to the Council that public convenience and necessity requires additional terminal vehicle service and shall recommend the number of such vehicle licenses which may be issued.

"In determining whether public convenience and necessity require additional terminal vehicle service, due consideration shall be given to the following:

"1. The public demand for such service;

2. The effect of an increase in the number of such vehicles on the safety of existing vehicular and pedestrian traffic in the area of their operation;

3. The effect of an increase in the number of such vehicles upon the ability of the licensee to continue rendering the required service at reasonable fares and charges to provide revenue sufficient to pay for all costs of such service, including fair and equitable wages and compensation for licensee's employees and a fair return on the investment in property devoted to such service;

4. Any other facts which the Commissioner may deem relevant.

"If the Commissioner shall report that public convenience and necessity require additional terminal vehicle service, the Council, by ordinance, may fix the maximum number of terminal vehicle licenses to be issued, not to exceed the number recommended by the Commissioner."

The precise issue presented is therefore—does the *power to forbid* the operation of Transfer as an incident of railroad transportation on the grounds of public convenience and necessity violate the commerce clause of the Constitution; and, does the discretion contained in said section constitute a burden on interstate commerce so as to render the ordinance invalid. It is apparent that the language of the above section does not prevent Transfer
427 from performing its interstate commerce operation. Transfer has not applied for a permit or license as a terminal vehicle operator under the City's ordinance.

The powers of municipalities to control the use of their streets is stated in 64 C. J. S., Municipal Corporations, § 1760, page 199, as follows:

"As a mere privilege, the use of streets by common

carriers is subject to reasonable control and regulation, and since such a right and privilege is special, unusual, and extraordinary, the power to regulate and restrict such use of the streets is broader than in respect of their use by the general public. The state or municipality, within the limits of its delegated powers, may determine to what extent or on what streets such an extraordinary use as encroaches on the paramount rights of the public at large will be permitted, and it may discriminate against those making such use of the streets, and may either grant or withhold the right or privilege of operating vehicles for such a purpose, and may grant it to some and refuse it to others without violating the constitution, except that a license or permission cannot be granted to some and refused to others who are willing to comply with the terms and conditions of the regulation providing for such license or permission."

In *Railway Express Agency v. New York*, (1948) 336 U. S. 106, 111, the Supreme Court stated:

"Where traffic control and use of highways are involved and where there is no conflicting federal regulation, great leeway is allowed local authorities, even though the local regulation materially interferes with interstate commerce."

The legal philosophy expounded in *Bush v. Maloy*, (1924) 267 U. S. 317 and *Buck v. Kuykendall*, (1924) 267 U. S. 307, does not reject the principle that a provision for exercise of discretion is valid when properly authorized under the police power delegated. These cases support the proposition that the granting or refusing of a permit for interstate transportation over state highways is a proper exercise of state authority provided that it is not used to control or burden interstate commerce. This distinction was observed in *Bradley v. Pub. Utility Comm.*, (1932) 289 U. S. 92, 95:

"It is contended that an order denying to a common carrier by motor a certificate to engage in interstate transportation necessarily violates the Commerce Clause. The argument is that under the rule declared in *Buck v. Kuykendall*, 267 U. S. 307 and *Bush & Sons Co. v. Maloy*, 267 U. S. 137, an interstate carrier is entitled to a certificate as of right; and that hence the

reason for the commissioner's refusal and its purpose are immaterial. In those cases, safety was doubtless promoted when the certificate was denied, because intensification of traffic was thereby prevented. See *Stephenson v. Binford*, 287 U. S. 251, 269-272. But there, promotion of safety was merely an incident of the denial. Its purpose was to prevent competition deemed undesirable. The test employed was the adequacy of existing transportation facilities; and since the transportation in question was interstate, denial of the certificate invaded the province of Congress. In the case at bar, the purpose of the denial was to promote safety; and the test employed was congestion of the highway. The effect of the denial upon interstate commerce was merely an incident."

It is contended that the purpose of the ordinance was to favor Parmalee, to assure the continuance of Parmalee's operations, and thus to prevent the operation of Transfer in competition with Parmalee. If the legislation is within the power properly granted to municipal authorities, the courts of Illinois have held that in determining its validity, the motive which prompted its enactment is not a matter of concern and an ordinance will not be declared invalid because of motives which induced its passage. *Murphy v. Chicago, R. I. & P. Ry. Co.*, (1910) 247 Ill. 614; *Keig Stevens Baking Co. v. City of Savanna*, (1942) 380 Ill. 303; *Stearns v. City of Chicago*, (1938) 368 Ill. 112; *City of Chicago v. Walters*, (1936) 363 Ill. 125 aff'd *Hauge v. City of Chicago*, 299 U. S. 387; *Tribune Co. v. Thompson*, (1930) 342 Ill. 503; *Moskal v. Catholic Bishop of Chicago*, (1942) 315 Ill. App. 461.

The above section of the ordinance does not grant the Commissioner and City Council an arbitrary right to refuse a terminal vehicle license. It is true it confers a discretionary power, but this condition is valid where the public health and safety are involved. In such instances courts are loath to interfere with legislative discretion and reluctant to declare such ordinances invalid. *Tower Realty v. City of East Detroit* (C. A. 6, 1952), 196 F. (2d) 710. The fact that discretion is lodged in an official or group of officials to grant or withhold a license does not entitle plaintiffs to complain until the license is arbitrarily or unlawfully withheld because

"* * * one who is within the terms of the statute

but has failed to make the required application, is not at liberty to complain because of his anticipation of improper or invalid action in administration." *Smith v. Cahoon* (1931), 283 U. S. 553.

In *Lehon v. City of Atlanta* (1916), 242 U. S. 53, the Supreme Court stated:

"To complain of a ruling, one must be made the victim of it. One cannot invoke to defeat a law, an apprehension of what might be done under it, and which, if done, might not receive judicial approval."

Plaintiffs have offered no evidence in support of the motion to enjoin the enforcement of the ordinance and the allegations of the verified complaint in connection therewith are the basis for its application for injunctive relief. Fines, and even imprisonment, which might result from continued violations of the ordinance do not constitute irreparable injury. Such results could be avoided by obeying the ordinance. Even if there was doubt as to the constitutionality of a statute, a fear of multiplicity of suits, fines and impairment of business are not of themselves sufficient ground for equitable relief against the enforcement of such a statute. *Dalton Adding Machine Co. v. Comm. of Va.* (1915), 236 U. S. 699; *Starnes v. City of Milledgeville* (D. C. Ga., 1944), 56 F. Supp. 956; *S. Buchsbaum & Co. v. Beman* (D. C. Ill., 1936), 14 F. Supp. 445, 447.

The court concludes that the ordinance under consideration is not invalid as an attempt to regulate and control interstate commerce, but is the legitimate exercise of police power by the City of Chicago in the interest of the safety and convenience of the public. *Bradley v. Pub. Utilities Comm.* (1933), 289 U. S. 92; *Continental Baking Co. v. Woodring* (1932), 286 U. S. 325; *Stephenson v. Binford* (1934), 287 U. S. 251; *Texport Carrier Corp. v. Smith* (D. C. Tex., 1933), 8 F. Supp. 28; *Wald Storage & Transfer v. Smith* (D. C. Tex., 1933), 4 F. Supp. 61 aff'd 290 U. S. 596.

Plaintiffs contend that the ordinance does not apply to them because (1) as public utilities they are excepted from its provisions, and (2) it was not the intention of the City Council in passing the amendment to include the service by Transfer as a "terminal vehicle" service.

Conceding that the plaintiff railroads are public utili-

ties and as such beyond the control of the City of Chicago, is the operation of Transfer within the exemption?

The railroads assert that under §3(4) and §302(c)(2) of the Interstate Commerce Act, 49 U. S. C. A., Transfer's service is an integral part of their railroad operation which they are obliged to provide. Section 3(4) of the Act provides for the interchange of traffic as follows:

"All carriers subject to the provisions of this chapter shall, according to their respective powers, afford all reasonable, proper and equal facilities for the interchange of traffic between their respective lines, and for the receiving, forwarding and delivering of passengers or property to and from connecting lines; and shall not discriminate in their rates, fares, and charges between connecting lines, or unduly prejudice any connecting line in the distribution of traffic that is not specifically routed by the shipper. * * *"

431 In *Kentucky & L. Bridge Co. v. Louisville & N. R. Co.*, (C. C. D. Ry., 1889) 37 Fed. 628, the court referred to *Railroad Co. v. Railroad Co.*, 1 I. C. C. Rep. 94, in connection with a discussion on through tickets and quoted as follows:

"* * * such tickets very evidently are a great convenience to travelers, and perhaps to connecting roads; but they are part of the voluntary arrangements for business purposes, like joint tariffs, interchange of cars, and common use of depots. It being, the refore, under our statute, matter of mutual agreement, whether coupon or through tickets shall be sold by a railroad company over roads of other companies, it follows that the form of such tickets, and the manner of their sale, are also matters of agreement by the companies the form of their tickets and how they shall be sold, they have the right to do so, and by such agreement become interstate carriers; but if they cannot agree, the act does not undertake to coerce them to do business together upon terms that may be justly objectionable or injurious. * * * No authority is conferred upon common carriers of interstate commerce to issue through tickets to passengers, or through bills of lading for property, at through rates, over connecting lines, in the absence of such arrangements between the companies. * * *"

Arrangements for through tickets and other incidences to their function as common carriers are left to the discretion of the railroads. In these facets of their operations, it was stated in *I. C. C. v. Baltimore & O. R. Co.*, (C. C. D. Ohio, 1890) 43 Fed. Rep. 37, 51 that

“ * * * the act to regulate commerce leaves common carriers as they were at the common law, free to make special contracts looking to the increase of their business, to classify their traffic, to adjust and apportion their rates so as to meet the necessities of commerce, and generally to manage their important interests upon the same principles which are regarded as sound, and adopted in other trades and practices.”

432 This interchange of traffic between carriers is left to the voluntary action of the railroads involved and a railroad is not under a compulsion or duty to provide such facilities in the absence of Commission action requiring it in the public interest. *Southern Pac. v. I. C. C.*, (1905) 200 U. S. 536, 553; and other cases cited under §3 (4). The character of the service provided for by Transfer is incidental to railroad operation and is analogous to contracts by railroads for heat, light and power for their terminal stations. The service of Transfer does not constitute an operation as a public utility and its motor vehicles are not, therefore, excluded from the operation of the ordinance.

Plaintiffs contend that the particular service provided by Transfer was not intended to be included within the scope of the Public Passenger Vehicle ordinance and particularly §29-1 thereof. The reasons urged in support of this argument are: (1) that if it is applicable, then the City Council deliberately disregarded the relation of such service to through railroad transportation of which it is an integral part; and (2) that the amendments to the ordinance after June 16, 1945 to the present and changes in the qualifications and definitions of “public passenger vehicle” and “terminal vehicle” show an intention to exclude Transfer’s service.

If the conclusion that the City Council deliberately disregarded the relationship of Transfer’s service to the railroads is sound, it emphasizes the Council’s intent to include its operation.

With respect to plaintiffs conclusion that prior to 1950 this type of service was expected as being a public utility operation, references to earlier definitions of "public passenger vehicle" are of no assistance because of the difference in language contained in the present ordinance. The court has determined that Transfer's service is not excepted as a public utility operation.

The last point urged by plaintiffs is that the ordinance did not intend to include Transfer's operation in the definition of a "terminal vehicle" as a public passenger vehicle because Transfer's services are exclusively devoted to interstation transportation. Regardless of whether this exclusive service was covered by previous ordinances, the language of the present ordinance is clear and unambiguous. It provides in §28-1 that

" 'Terminal vehicle' means a public passenger vehicle which is operated exclusively for the transportation of passengers from railroad terminal stations and steamship docks to points within the area defined in Section 28-31."

Section 28-1 contains no qualifying or limiting language from which the court can conclude that the service by Transfer's vehicles was not encompassed within its scope. All the railroad terminals which Transfer serves are within the geographical area defined. The legislative history and background surrounding the passage of amended §28-1 has been considered. The exhibits show discussion as to whether only interstation transportation was intended to be covered or whether all transportation from railroad stations within the designated area was to be included. These exhibits fail to indicate an intention to except interstation transportation of coupon holders by Transfer's vehicles.

In summary, the court holds the Public Passenger Vehicle ordinance, as amended July 26, 1955, to be a proper exercise of the City's police power and that the services of Transfer are within the ambit of its application.

The plaintiffs' motion for temporary injunction is denied, and the motion of the City of Chicago for summary judgment is sustained. Counsel are requested to present ap-

appropriate Findings of Fact, Conclusions of Law and Judgment Order within three (3) days from date hereof.

Walter J. LaBuy,

Judge, United States District Court.

December 12, 1955.

434 Messrs. Benjamin F. Goldstein and

Albert J. Meserow; 209 S. La Salle (4)

Amos M. Mathew, Esquire

280 Union Station (6)

Lee A. Freeman, Esquire

208 South La Salle

John C. Meianiphy,

Acting Corporation Council

City Hall

435 And afterwards on, to wit, the 15th day of December, 1955 came the Defendants by their attorneys and filed in the Clerk's office of said Court their certain Notice and Proposed Judgment Order in words and figures following, to wit:

436 IN THE DISTRICT COURT OF THE UNITED STATES.

(Caption—55-C-1883)

NOTICE.

To: Benjamin F. Goldstein,

Attorney for Plaintiff

209 S. LaSalle St.,

Chicago, Illinois:

Lee A. Freeman,

Attorney for Intervenor,

Parmalee Transportation Co.,

208 S. LaSalle St.,

Chicago, Illinois.

Amos M. Mathew, Esquire

280 Union Station,

Chicago 6, Illinois.

Please take notice that on Thursday, December 15, 1955, at 2 P. M., or as soon thereafter as counsel can be heard, we shall appear before the Honorable Walter J. LaBuy

in the courtroom usually occupied by him in the United States District Courthouse, Chicago, Illinois, and shall then and there present a judgment order pursuant to the memorandum opinion of the court, a copy of which judgment order is herewith served upon you.

John C. Melaniphy,

Acting Corporation Counsel.

Joseph F. Grossman,

Special Assistant Corporation Counsel.

Attorneys for Defendants.

Received a copy of the above and foregoing notice this 15th day of December, 1955.

Haight, Goldstein & Haight,

By E. A. Wahlen,

Amos M. Mathews,

By Evelyn Macabico,

Lee A. Freeman

437 IN THE DISTRICT COURT OF THE UNITED STATES.

(Caption—55-C-1883)

JUDGMENT ORDER.

This cause coming on to be heard upon the verified complaint, motion for preliminary injunction and affidavits of the plaintiffs, the verified petition to intervene and affidavits of intervenor, Parmalee Transportation Company, the motion for summary judgment of the city of Chicago, the briefs and arguments of counsel, and the court being fully advised in the premises, finds:

1. Federal jurisdiction is premised upon Sections 1331 and 1337 of the Judicial Code, 28 U. S. C. A. Questions arising under the Constitution and laws of the United States are in controversy involving a sum in excess of requisite jurisdictional amount.

438 2. Railroad Transfer Service, Inc., (hereinafter "Transfer") one of the plaintiffs herein, has entered into a five year contract with the railroad companies, plaintiffs herein, under which Transfer, as an independent contractor, has undertaken to transfer passengers traveling through Chicago, between terminal railroad stations in

the City of Chicago, by means of motor vehicles and to provide for the pick-up and delivery of baggage within the Chicago metropolitan area.

Under said contract, upon the rendition of its interstation passenger service, Transfer collects transfer coupons previously issued or sold to the passengers by the railroads as a part of their established joint rates and through routes. The transfer coupons are redeemed by the outbound railroad at fixed rates of compensation. The pick-up and delivery of baggage service is separately contracted for by the individuals desiring the service.

The railroads have provided interstation transfer services in Chicago as a means of meeting the competition of other railroad routings through Chicago involving only a single terminal station and, therefore, not requiring 439 interstation transfers. Similar provisions for transfer of passengers between stations have been provided by the railroads in other terminal areas, although in many instances and terminal areas passengers are required to make their own transfer arrangements even though through tickets are sold.

3. The City Council of the city of Chicago has duly enacted Chapter 28 of the Municipal Code of Chicago, a copy of which, as amended, is attached to the complaint as Exhibit B.

4. Chapter 28 of the Municipal Code of Chicago, as amended, declares it unlawful to operate a public passenger vehicle on the public ways of the city without a public passenger vehicle license. Such licenses are issued upon application and determination by the City Public Vehicle License Commissioner, among other factors, that the applicant is of proper character and reputation; that he has the requisite financial ability to render safe service, maintain equipment and pay all judgments resulting from the operations; that the vehicles proposed to be used are in safe operating condition with adequate body and seating facilities in part as specified in the ordinance; and that adequate public liability and property damage insurance is provided. The ordinance further provides that be-

440 fore additional terminal vehicle licenses may be issued the Commissioner shall conduct public hearings and give due consideration to the public demand for additional service, the effect upon the safety of pedestrian and vehicular traffic, the effect upon existing licensees and such other factors which shall enable the Commissioner to de-

termine and report that the public convenience and necessity requires the additional terminal vehicle licenses.

These provisions and requirements of the city ordinance are appropriately related to the public safety, health and welfare and are proper and reasonable exercises of the police power functions of the city, in the regulation of the commercial use of its streets.

5. (a) Transfer is not a public utility under the laws of Illinois.

(b) By virtue of its contract with plaintiff railroad companies, Transfer does not operate its vehicles within the city of Chicago exclusively as agent for and in behalf of plaintiff railroads as a public utility under the laws of Illinois, as defined in Section 28-1 of the Municipal Code of Chicago.

(c) Transfer's operations are confined to the transportation of passengers within the city on through route railroad tickets covering trips between points outside of the corporate limits of the city in intrastate and interstate commerce.

441 (d) Said operations are for hire from place to place within the corporate limits of the city as provided in Section 28-2 of the Municipal Code of Chicago.

(e) Transfer's vehicles are "terminal vehicles" as defined in Section 28-1 and are subject to all the provisions and regulations of Chapter 28 of the Municipal Code of Chicago, as amended applicable thereto.

6. Transfer has not applied for nor sought licenses from the city of Chicago to operate its vehicles as public passenger vehicles.

7. The Interstate Commerce Commission has not undertaken to exercise any supervision of the services performed by Transfer (except maximum hours of employee work).

8. Chapter 28 of the Municipal Code of Chicago contains reasonable police power controls and requirements in furtherance of the public safety. As such, those controls and requirements may be validly imposed upon motor vehicle operations over city streets, even though such motor vehicle operations are in, or a part of, interstate commerce without constituting an unlawful or unconstitutional burden upon interstate commerce in violation of the Constitution of the United States.

442 9. Under Chapter 28 of the Municipal Code of Chicago, the city may refuse to license vehicles to be

used in interstate commerce, if the applicant is not of proper character and reputation as a law abiding citizen; or the applicant fails to demonstrate financial ability to render safe and comfortable service, maintain his equipment and pay all judgments arising out of the operations; or the vehicles sought to be licensed are not in safe or proper condition, do not have adequate body and seating facilities or do not comply with the specific requirements of the ordinance; or the requisite public liability, property damage and workmen's compensation insurance is not maintained; or if the issuance of additional licenses would adversely affect the safety of pedestrians and vehicular traffic in the area.

10. The operation of terminal vehicles over the streets and public places of the City of Chicago, by Transfer without public passenger terminal vehicle licenses as required by Chapter 28 of the Municipal Code of Chicago is unauthorized and unlawful.

443 It Is Therefore Hereby Ordered, Adjudged and Decreed that the motion of the plaintiffs herein for a preliminary injunction restraining the defendant City of Chicago and its named officers from enforcing or attempting to enforce the ordinances of the city of Chicago contained in Chapter 28 of the Municipal Code of Chicago as against plaintiff, Railroad Transfer Service, Inc., be and it is hereby denied.

It Is Further Ordered, Adjudged and Decreed that the temporary restraining order heretofore entered by this court on October 24, 1955, successively extended, be and it is hereby vacated.

It Is Further Ordered, Adjudged and Decreed that the motion of the City of Chicago for a summary judgment be and it is hereby granted.

Enter:

Judge.

Dated December, 1955.

444 And on the same day, to wit, on the 15th day of December, 1955, being one of the days of the regular December term of said Court, in the record of proceedings thereof, in said entitled cause, before the Honorable Walter J. La Buy, District Judge, appears the following entry, to wit:

445. IN THE UNITED STATES DISTRICT COURT.
* * (Caption—55-C-1883) * *

It Is Ordered that leave be and hereby is granted to file objections to proposed findings of fact, conclusions of law and judgment on or before January 2, 1956 and that hearing thereon be and it hereby is continued to January 16, 1956.

446 And afterwards on, to wit, the 20th day of December, 1955 came the Defendants by their attorneys and filed in the Clerk's office of said Court their certain Notice and Proposed Draft Order in words and figures following, to wit?

447 IN THE DISTRICT COURT OF THE UNITED STATES.
* * (Caption—55-C-1883) * *

NOTICE:

To: Benjamin F. Goldstein,
Attorney for Plaintiff,
209 S. LaSalle St.,
Chicago, Illinois.

Amos M. Mathews, Esquire,
200 Union Station,
Chicago 6, Illinois.

Lee A. Freeman,
Attorney for Intervenor,
Parmelee Transportation Co.,
208 S. LaSalle St.,
Chicago, Illinois.

Please take notice that on Monday, January 16, 1956, at 10 A. M., or as soon thereafter as counsel can be heard, we shall appear before the Honorable Walter J. LaBuy in the courtroom usually occupied by him in the United

States District Courthouse, Chicago, Illinois, and shall then and there withdraw the draft order presented on December 15, 1955 and substitute the judgment order, a copy of which is herewith served upon you, and that objections or exceptions to the substitute order be then and there considered by the court.

John C. Melaniphy,

Acting Corporation Counsel,

Joseph F. Grossman,

Special Assistant Corporation Counsel,

Attorneys for Defendants.

Received a copy of the above and foregoing notice with judgment order attached this 20th day of December A. D. 1955.

Haight, Goldstein & Haight,

By E. A. Wahlen,

Amos Mathews,

By R. F. Munsell,

Lee H. Freeman.

ORDER OF SUMMARY DECLARATORY JUDGMENT.

This cause coming on to be heard upon the verified complaint, plaintiffs' motion for preliminary injunction and affidavits in support of said motion, the verified petition of Parmelee Transportation Company to intervene as a defendant and affidavits in behalf of defendant intervenor, the motion for summary judgment of defendants City of Chicago and its officers and the briefs and arguments of counsel, and the court being fully advised in the premises, finds:

(a) That the federal jurisdiction is premised upon Sections 1331 and 1337 of the Judicial Code, 28 U. S. C. A. granting to district courts original jurisdiction of civil actions arising under the constitution and laws of the United States involving a sum in excess of the requisite jurisdictional amount;

(b) That there is no genuine issue of fact involved in this controversy and the motion of defendants City of Chicago and its officers for summary declaratory judgment to determine the controversies in this action as a matter of law is sustained.

449

Material Facts.

1. Railroad Transfer Service, Inc. (hereinafter "Transfer"), one of the plaintiffs herein, has entered into a five year contract with plaintiffs railway and railroad companies (hereinafter "Terminal Lines") under which Transfer as an independent contractor has undertaken to transport, by motor vehicles, passengers traveling through Chicago between railroad stations within the Chicago terminal area.

2. Terminal Lines have provided interstation transfer services in Chicago as a means of meeting the competition of other railroad routings through Chicago involving only a single terminal station which do not require interstation transfers. Similar provisions for transfer of passengers between stations have been provided by railroads in other terminal areas, although in many such terminal areas passengers are required to make their own transfer arrangements between terminal stations on through railroad tickets.

3. Transfer collects transfer coupons previously issued to passengers pursuant to tariffs applicable to through fares published by Terminal Lines and filed with the Interstate Commerce Commission and the Illinois Commerce Commission. The transfer coupons are redeemed by the outgoing Terminal Lines at rates of compensation fixed by said contract.

4. Transfer's operations began on October 1, 1955, and are confined to the transportation of passengers within the city on through route railroad tickets covering trips between points outside and beyond the corporate limits of the city in intrastate and interstate commerce. More than 99% of all such through passenger service is interstate commerce.

450 5. Chapter 28 of the Municipal Code of Chicago, as amended (hereafter "Ordinance"), a copy of which is attached to the complaint as Exhibit B, was passed by the City Council of the city of Chicago and became effective prior to October 1, 1955.

The Ordinance provides for the licensing of four classes of public passenger vehicles, one of which is designated as a terminal vehicle. Such licenses are issued, upon application, by the city Public Vehicle License Commissioner. If, upon investigation, he finds that the applicant is qualified as a law abiding citizen; that he has the financial ability to render safe and comfortable transportation service, to maintain or replace the equipment for such service and to pay all judgments and awards which may be rendered for any cause arising out of the operation of a public passenger vehicle during the license period; that the vehicles proposed to be used are in safe operating condition with adequate body and seating facilities as specified in the Ordinance; and that adequate public liability and property damage insurance is provided.

6. Section 28-1 of the Ordinance defines "Public Passenger Vehicle" and "Terminal Vehicle" as follows:

"Public passenger vehicle" means a motor vehicle, as defined in the Motor Vehicle Law of the State of Illinois which is used for the transportation of passengers for hire, excepting those devoted exclusively for funeral use or in operation of a metropolitan transit authority or public utility under the laws of Illinois.

"Terminal vehicle" means a public passenger vehicle which is operated exclusively for the transportation of passengers from railroad terminal stations and steamship docks to points within the area defined in Section 28-31

451 7. Section 28-2 of the Ordinance is in part as follows:

"28-2. License required.) It is unlawful for any person other than a metropolitan transit authority or public utility to operate any vehicle, or for any such person who is the owner of any vehicle to permit it to be operated, on any public way for the transportation of passengers for hire from place to place within the corporate limits of the city, except on a funeral trip, unless it is licensed by the city as a public passenger vehicle."

8. Section 28-31 of the Ordinance is as follows:

"28-31. Terminal Vehicles.) Terminal vehicles shall not be used for transportation of passengers for hire except from railroad terminal stations and steamship dock to destinations in the area bounded on the north by E. and W. Ohio Street; on the west by N. and S. Desplaine Street; on the south by E. and W. Roosevelt Road; and on the east by Lake Michigan."

The area described in Section 28-31 is commonly known as the central business district of Chicago in which the principal commercial hotels and all of the terminal stations of Terminal Lines and steamship docks are located.

1. Sections 28-31.1 and 28-31.2 provide as follows:

"28-31.1. Public convenience and necessity.) No license for any terminal vehicle shall be issued except in the annual renewal of such license or upon transfer to permit replacement of a vehicle for that licensed unless, after a public hearing held in the same manner as specified for hearings in Section 28-22.1, the commissioner shall report to the council that public convenience and necessity require additional terminal vehicle service and shall recommend the number of such vehicle licenses which may be issued."

452 In determining whether public convenience and necessity require additional terminal vehicle service due consideration shall be given to the following:

1. The public demand for such service;
2. The effect of an increase in the number of such vehicles on the safety of existing vehicular and pedestrian traffic in the area of their operation;
3. The effect of an increase in the number of such vehicles upon the ability of the licensee to continue rendering the required service at reasonable fares and charges to provide revenue sufficient to pay for all costs of such service, including fair and equitable wages and compensation for licensee's employees and a fair return on the investment in property devoted to such service;
4. Any other facts which the commissioner may deem relevant.

If the commissioner shall report that public convenience and necessity require additional terminal vehicle service, the council, by ordinance, may fix the maximum number of terminal vehicle licenses to be issued not to exceed the number recommended by the commissioner.

28-31.2. Local Fares.) The rate of fare for local transportation of every passenger in terminal vehicles of the licensee shall be uniform, regardless of the distance traveled; provided that children under 12 years of age, when accompanied by an adult, shall be carried at not more than half fare. Such rates of fare shall be posted in a conspicuous place or places within each vehicle as determined by the commissioner."

10. Except as to maximum hours of service of em-

ployees, the Interstate Commerce Commission has not undertaken to exercise any supervision of the services performed by Transfer, and Transfer has not applied for nor sought licenses from the city to operate its vehicles as Public Passenger Vehicles.

453

Conclusions of Law.

1. Transfer is not a public utility under the laws of Illinois, and does not operate its vehicles within the city of Chicago exclusively as agent for and in behalf of Terminal Lines as public utilities under the laws of Illinois.

2. Transfer operates its motor vehicles on public ways for the transportation of passengers for hire from place to place within the corporate limits of the city as provided in Section 28-2 of the Ordinance.

3. Section 28-31.1 of the Ordinance does not prevent Transfer from performing its interstate commerce operation as an incident of railroad transportation. It does not grant the Public Vehicle License Commissioner and the City Council an arbitrary right to refuse a terminal vehicle license. It confers a discretionary power to grant or withhold such license under the police power delegated to the city to control traffic on the city streets in the interest of public safety and Transfer is not at liberty to complain of potential arbitrary and unlawful administration of the Ordinance until it has applied for and has been refused such license.

It Is Therefore Ordered, Adjudged and Decreed that the motion of plaintiffs for a preliminary injunction restraining the defendants City of Chicago and its officers from enforcing or attempting to enforce the provisions of the Ordinance, Chapter 28 of the Municipal Code of Chicago, against plaintiff Railroad Transfer Service, Inc. be and it is hereby denied.

454 It Is Further Ordered, Adjudged and Decreed that the temporary restraining order heretofore entered by this court on October 24, 1955, and successively extended, be and it is hereby vacated.

Enter:

Dated: January, 1956. /

Judge.

537 And afterwards on, to wit, the 6th day of January, 1956 there was received in the Clerk's office of said Court the certain Conclusions of Law to be Submitted in the "Order of Summary Declaratory Judgment" submitted by the City of Chicago in words and figures following, to wit:

538 IN THE DISTRICT COURT OF THE UNITED STATES.

* * (Caption—55-C-1883) * *

CONCLUSIONS OF LAW TO BE SUBSTITUTED IN THE "ORDER OF SUMMARY DECLARATORY JUDGMENT" SUBMITTED BY THE CITY OF CHICAGO.

The city of Chicago on December 20, 1955, served notice of its intention to present to the court on January 16, 1956, an "Order of Summary Declaratory Judgment, a copy of which was served upon all parties. Included in the said "Order of Summary Declaratory Judgment were suggested Conclusions of Law.

Parmelee Transportation Company suggests to the court the substitution of the following Conclusions of Law, but in all other respects adopts the city's suggested order.

Conclusions of Law.

1. Transfer is not a public utility under the laws of Illinois and does not devote its vehicles exclusively to the operation of a public utility under the laws of Illinois.

539 2. Transfer operates its motor vehicles on public ways for the transportation of passengers for hire from place to place within the corporate limits of the city as provided in Section 28-2 of the ordinance. The operations of Transfer constitute terminal vehicle operations as defined in Section 28-1 of the ordinance.

3. Chapter 28 of the ordinance is a proper exercise of police power by the city in the interest of the safety, health and welfare of the public. The federal government has not undertaken to regulate the subjects over which the city has thus exercised its police power. The Congress of the United States has not indicated an intention to pre-

clude local controls in this field. The imposition by the city of regulations and controls upon Transfer is appropriate to the public safety, health and welfare and does not constitute an invalid or unconstitutional burden upon interstate commerce.

4. The ordinance does not grant the Public Vehicle License Commissioner and the City Council an arbitrary right to refuse a terminal vehicle license. It confers a discriminatory power to grant or withhold such license under the police power delegated by the city to control traffic on the city streets and for other purposes in the interest of public safety, health and welfare. Transfer is not at liberty to complain of potential arbitrary and unlawful administration of the ordinance until it has applied for and been improperly refused such license.

Respectfully submitted,

Lee A. Freeman,

*Attorney for Parmelee Transportation
Company; Intervenor.*

Lee A. Freeman,
195 South LaSalle Street,
Chicago 3, Illinois;
An. 3-5939.

541 And afterwards on, to wit, the 11th day of January, 1956 came the Plaintiffs by their attorneys and filed in the Clerk's office of said Court their certain Exceptions to Intervenor's Suggested Proposed Order of Summary Declaratory Judgment in words and figures following, to wit:

542 IN THE UNITED STATES DISTRICT COURT.
* * (Caption—55-C-1883) * *

PLAINTIFFS' EXCEPTIONS TO INTERVENOR'S SUGGESTED PROPOSED ORDER OF SUMMARY DECLARATORY JUDGMENT.

1. Plaintiffs Except to the Proposed Order of Summary Declaratory Judgment attached to the Notice by Parmelee, as Intervenor, served on Plaintiffs on January 5, 1956, to be presented to this Court on January 16,

1956, which Parmelee submits for substitution for the Proposed Order of Summary Declaratory Judgment attached to the Notice by the Defendants dated December 20, 1955, also to be presented to this Court on January 16, 1956.

2. Parmelee's Proposed Order of Summary Declaratory Judgment substitutes "Conclusions of Law" therein set forth for the Conclusions of Law set forth in the Defendants' Proposed Order of Summary Declaratory Judgment, "but in all other respects adopts the" Defendants' Proposed Order of Summary Declaratory Judgment.

3. Parmelee's proposed Conclusions of Law differ from the Defendants' proposed Conclusions of Law set forth in the Defendants' document under the numbered paragraph herein referred to in the heading in the following respects:

Parmelee No. 1 (Def. No. 1).

(a) Parmelee eliminates the following portion of this paragraph:

"Parmelee * * * does not operate its vehicles within the City of Chicago exclusively as agent for and in behalf of Terminal Lines as public utilities under the law of Illinois."

(b) Parmelee substitutes for that language the following language:

"Parmelee * * * does not devote its vehicles exclusively to the operation of a public utility under the laws of Illinois";

Parmelee No. 2 (Def. No. 2).

Parmelee adds the following sentence at the end of this paragraph:

"The operations of Transfer constitute terminal vehicle operations as defined in Section 28-1 of the Ordinance."

Parmelee No. 3.

Parmelee adds a new paragraph numbered 3 which reads:

"3. Chapter 28 of the ordinance is a proper exercise of police power by the city in the interest of the safety, health and welfare of the public. The federal government has not undertaken to regulate the subjects over which the city has thus exercised its police power. The Congress

of the United States has not indicated an intention to preclude local controls in this field. The imposition by the city of regulations and controls upon Transfer is appropriate to the public safety, health and welfare and does not constitute an invalid or unconstitutional burden upon interstate commerce."

Parmelee No. 4 (Def. No. 3).

(a) Parmelee omits the first sentence of this paragraph which reads:

544 "Section 28-31.1 of the Ordinance does not prevent Transfer from performing its interstate commerce operation as an incident of railroad operations."

(b) Parmelee divides the third sentence of this paragraph into two sentences, adds the words underscored herein, and omits the words placed in parenthesis herein:

"It confers a discretionary power to grant or withdraw such licenses under the police power delegated to the city to control traffic in the city streets and for other purposes in the interest of public, safety, health and welfare. (and) Transfer is not at liberty to complain of potential arbitrary and unlawful administration of the ordinance until it has applied and (has) been improperly refused such license."

(c) Parmelee rennumbers 3 to be "4".

**PLAINTIFFS' EXCEPTIONS TO PARMELEE'S
PROPOSED FINDINGS OF FACT.**

4. Plaintiffs Except to Parmelee's Proposed Findings of Fact which by reference adopt the Defendants' Proposed Findings contained therein under the heading therein "Material Facts" upon the grounds set forth in Plaintiffs' Exceptions to Defendants' Proposed Order of Summary Declaratory Judgment filed with this Court on January 3, 1956 under the appropriate headings appearing in Part One and Part Two thereof, which by specific reference are made a part hereof.

5. One of the principal grounds for the Plaintiffs' Exceptions was that the Findings in the Memorandum on which the Defendants' Proposed Findings of Fact purport to be responsive are fatally defective in that the Court erroneously omitted and failed to make any reference or to take into account and give effect to—

(a) The decisive provisions and actual operations of the Agency Contract between the Terminal Lines and Transfer pleaded in the Complaint and set forth in the Agency Contract attached to, and made a part of the Complaint; and

545 (b) The decisive Section 1(4) of the Interstate Commerce Act (hereinafter referred to as "Act"), which was quoted in full in the Complaint.

6. These omitted decisive provisions and actual operations of the Agency Contract embrace the following material and pertinent facts:

Required interstation interstate through passenger and accompanying hand baggage transportation services (hereinafter referred to as "Required Interstation Transfer Service") are supplied by Transfer's passenger vehicles under the irrevocable five-year Agency Contract as Agent for, on behalf of, and for the account of, the Terminal Lines to their intransit interstate through passengers requiring such transfer service on arrival in Chicago to complete their through interstate journey via Chicago as a junction point. Each of such interstate through passengers purchased an original through ticket including as a part thereof a transfer coupon for that purpose, which entitles the Coupon holder to such Required Interstation Transfer Service by Transfer's passenger vehicles without additional charge.

This Required Interstation Transfer Service is performed by Transfer for the Terminal Lines only, and only under the Agency Contract between Transfer and the Terminal Lines which is exclusive in nature. The Terminal Lines absorb all the expense of this Required Interstation Transfer Service, pay Transfer for its performance of that service, at the rate and upon the terms and conditions specified in the Agency Contract. Transfer's passenger vehicles used in the Required Interstation Transfer

Service are devoted exclusively for use in the operation of that service only, and only for the Terminal

546 Lines. Plaintiff's passenger vehicles used in the Required Interstation Transfer Service are devoted exclusively for operation in that service, and only by Coupon holders of the Terminal Lines, and only for use by such Coupon holders for such Required Interstation Transfer Service.

This Required Interstation Transfer Service so per-

formed by Transfer, the Terminal Lines are required to perform under Section 1(4) of the Act as part of the complete interstate through passenger transportation service which the Terminal Lines are required by Section 1(4) of the Act to establish over their connecting lines via Chicago as a junction point and to meet the competitive conditions of the connecting Terminal Lines using the same terminal station of the 8 terminal stations in that City which are used by one or more but not all of the twenty-one Terminal Lines.

The inclusion, or exclusion, of these omitted decisive facts and statutory requirements as part of the material and pertinent facts to form the factual basis for the Court's findings has a decisive significance on the determination of every issue arising on the Defendants' Motion for Summary Declaratory Judgment—i. e., whether the Ordinance as construed by the Court to be a grant of power to forbid, on grounds of public convenience and necessity, the use of the streets of Chicago to Transfer's passenger vehicles when related to the operations of Transfer, either as found by the Court on the factual basis recited in the Memorandum, or on the factual basis which Plaintiffs contend should have been used for that purpose:

(a) Constitutes an attempt by the City to invade a field which the Commerce Clause reserved for Federal regulation;

(b) Constitutes an attempt by the City to regulate a particular interstate activity over which Congress 547 had already exercised supervision or had already indicated a clear intention so to do;

(c) Constitutes an attempt by the City to regulate a particular activity; found by the Court to be essentially local in character, over which Congress has not yet undertaken regulation and has not yet shown a clear intent so to do, and which has been exercised by the City authorities in such an arbitrary or discriminatory manner as to cause an undue burden on interstate commerce;

(d) Constitutes an attempt by the City to regulate Transfer's passenger vehicles which are exempted "public passenger vehicles" as being devoted exclusively in a "public utility operation" under the laws of the State of Illinois.

7. Similarly the inclusion, or exclusion, of these omitted decisive facts and statutory requirements as part of the

material and pertinent facts to form the factual basis for the Court's findings has a decisive significance on the determination of the issues arising on Plaintiff's Motion for Temporary Injunction, whether—

(a) The consequences which would result from Plaintiffs' compliance with the Ordinance, as the Court required, or from Plaintiffs' noncompliance with the Ordinance as they contend to be their constitutional right, pending the final determination of the validity and applicability to Transfer's passenger vehicles of the Ordinance as construed by this Court, would cause irreparable injury and damage to Plaintiffs' property and property rights in violation of their constitutional rights; and

(b) The refusal to grant the temporary injunction to restrain enforcement of the Ordinance as construed by this Court pendente lite would cause irreparable damage to the Plaintiffs for which none of them would have an adequate remedy at law.

8. The decisive facts pointed out in the Complaint with respect to the Required Interstation Transfer Service and to which the Memorandum made no reference, and to which the Memorandum gave no effect whatsoever, include the same facts which were contained in the Complaint before this Court ten years ago in *United States v. Yellow Cab Co.*, 69 F. Supp. 170 (1946), but to which this Court's opinion in that case also failed to refer and give effect. But such omitted facts the Supreme Court of the United States in its Opinion in *United States v. Yellow Cab Co.*, 332 U. S. 218 (1947) overruling this Court's Opinion in that case, held were the decisive facts to which the then effective law (which is still the effective law) applied to require the conclusion that the portion of the through passenger service "from point of origin in one state to point of destination in another" state which consists of "the transportation of such passengers and their luggage between stations in Chicago * * * must be viewed in relation to the entire journey rather than in isolation. So viewed it is an integral step in the interstate movement." *United States v. Yellow Cab Co.*, 332 U. S. 218 at 228-229 (1947).

Ten years later, the same Parmelee, as Intervenor herein (then, and now the controlling stockholder of Yellow Cab Company, defendant in *United States v. Yellow Cab Co.*, supra), alone urged on this Court the same approach

which this Court has adopted in the Memorandum of viewing in the same isolation the same Required Interstation Transfer Service—which was established by the same Terminal Lines in the same Chicago Junction point to meet the same competitive conditions and the same federal statutory requirements which were before this 549 Court in that case—in spite of the fact that the Supreme Court of the United States in the same *United States v. Yellow Cab Co.*, supra, held ten years ago that such Required Interstation Transfer Service should be viewed only in relation to the remainder of the entire journey as an integral part in the interstate movement.

Under these extraordinary circumstances, Plaintiffs submit that it behooves this Court to take special heed of Parmelee's repudiation of this contention followed in the Memorandum, which Parmelee over the signature of the same Counsel who is also its sole Counsel of Parmelee, Intervenor herein before this Court, made in its verified Complaint filed in another Court since the hearings on the Motions covered by the Memorandum closed on November 17, 1955.

On December 1, 1955, Parmelee filed in the Superior Court of Cook County, State of Illinois, its verified Complaint for accounting against the same Terminal Lines, now parties Plaintiff in the case before this Court as defendants in that case (hereinafter referred to as "State Court Case"), based on the services and actual operations of its Agency contractual arrangements with them during the fifteen year period ending September 30, 1955.

Excepting for the one service embracing "transfer of passengers and accompanied hand baggage to passenger selected destinations in the downtown area of Chicago", listed in Parmelee's Complaint, and which is eliminated in the Agency Contract of Transfer, all the services 550 and actual operations of the Agency Contract of Transfer set forth in Plaintiffs' Complaint in the case before this Court which this Court omitted and to which this Court failed to refer and give effect to in the Memorandum, are also pointed out by Parmelee's Complaint in the State Court Case as relevant and material facts for purpose of accounting between Parmelee and the Terminal Lines on account of corresponding services and actual operations under Parmelee's Agency Contracts with the same Terminal Lines which were terminated on June 13, effective as of September 30, 1955.

In that Complaint, a photostatic copy of which is attached hereto as Plaintiffs' Exhibit 8, and a certified copy of which will be offered on the hearings herein on January 16, 1956, Parmelee pleads the following facts:

"3. There are eight (8) railroad terminal stations located in the downtown area of the city of Chicago into which some twenty-one (21) railroads operate and terminate their passenger services. Railroad travel through Chicago (except for minor instances) requires a change of trains from the incoming line to the outbound line. In some instances connecting carriers use the same railroad terminal station in which case, no transfer of passengers and their baggage between stations is required. In most instances, however, the connecting carriers use different railroad terminal stations thus necessitating transfer between stations.

"4. The Chicago Terminal Railroads are each common carriers as defined in Part I of the Interstate Commerce Act. Pursuant to the duty imposed by Section 1(4) of that Act through routes and reasonable joint rates have been established for railroad trips through Chicago involving connecting carriers in the Chicago terminal area with respect to said through routes and to meet the competition of connecting carriers using the same terminal station. The Chicago Terminal Railroads have provided by their tariffs for motor vehicles transfer between terminal stations by the issuance of transfer coupons on through tickets involving different terminal stations in Chicago. In such instances the transfer services and the charges made therefor were and are included in the established joint fares whether separately collected or not. At all times material Section 1(4) of the Interstate Commerce Act provided in this respect:

'It shall be the duty of every common carrier * * * engaged in the transportation of passengers or property * * * to establish through routes and just and reasonable rates, fares and charges applicable thereto, and to provide reasonable facilities for operating through routes and to make reasonable rules and regulations with respect to the operation of through routes, and providing reasonable compensation to those entitled thereto; * * *'

"5. The plaintiff and its predecessors in interest for over 102 years have operated as a so-called transfer company for the Chicago Terminal Railroads. Plaintiff's

operations have been conducted by means of limousines and motor trucks and have included the following functions:

(a) Transfer of passengers and accompanied hand baggage between railroad terminal stations;

(b) Transportation of passengers and accompanied hand baggage to passenger selected destinations in the downtown area of Chicago;

552 (c) Transfer of checked-through hand baggage and trunks between railroad terminal stations. Such baggage is handled by motor trucks separately from passenger transfer.

(These three functions will hereinafter sometimes be referred to as 'transfer services').

"6. During the period from January 1, 1935 to on or about September 30, 1955, the Chicago Terminal Railroads in order to provide reasonable facilities for the through routing of passengers and baggage in Chicago as required by Section 1(4) of the Interstate Commerce Act, continuously engaged plaintiff to transfer passengers and accompanying baggage between railroad terminal stations or from railroad terminal stations to passenger designated downtown Chicago destinations, and to transfer checked-through baggage and trunks between railroad terminal stations. * * * Plaintiff under said agreements was required to meet all trains and to provide sufficient facilities and personnel available at all times to transfer all passengers and their accompanying or checked-through baggage, to whom Chicago transfer coupons were sold or issued on through or combination railroad tickets.

"7. Said agreements required plaintiff to acquire, operate and maintain buildings, structures, vehicles, equipment and facilities specially designed for and dedicated to such transfer services and to secure and establish trained and continuously supervised special personnel in the rendition of such transfer services, which services were required to be adequate, reliable and dependable. * * *

"8. Under said agreements, the obligation of each of the Chicago Terminal Railroads to provide payment to plaintiff for the transfer services rendered or made available was fixed at an agreed upon charge per transfer coupon to be paid by the outbound carrier. * * *

These specified charges applied whether plaintiff performed all of the services possible for each passenger comprising the meeting of all trains, the transfer of the

passenger, his accompanying baggage plus his checked-through baggage, or only a part of such transfer services

553 "9. * * * Under said agreements all such transfer coupons were issued or sold by agents of originating railroads located throughout the United States at the time through or combination railroad tickets were sold * * *"

PLAINTIFFS' EXCEPTIONS TO PARMELEE'S
PROPOSED CONCLUSIONS OF LAW.

9. Plaintiffs Except to Parmelee's Proposed Conclusions of Law which repeat or revise Defendants' Proposed Conclusions of Law, on the same grounds on which Plaintiffs' Exceptions to the Defendants' Proposed Conclusions of Law are based, as set forth under the appropriate headings in Part One and Part Two of Plaintiffs' Exceptions to Defendants' Proposed Conclusions of Law.

10. Plaintiffs Except to Parmelee's Proposed Conclusions of Law on the following additional grounds:

(a) Parmelee's Proposed Conclusions of Law which purport to bear on the validity or applicability of the Ordinance described in the following language:

(1) "Section 20-2 of the Ordinance"; and "Section 28-1 of the Ordinance" (Parmelee's Proposed Conclusion numbered "2");

(2) "Chapter 28 of the Ordinance" (Parmelee's Proposed Conclusion numbered "3");

(3) "the Ordinance" (Parmelee's Proposed Conclusion numbered "4");
are fatally defective.

It is the Ordinance as construed by this Court which has legal significance; and that construction expressed in the Memorandum is that it is a grant of power to the Commissioner and the City Council to forbid, on grounds of public convenience and necessity, the use of the streets of Chicago to Transfer's passenger vehicles for specific
554 operations;

(b) Parmelee's Proposed Conclusions of Law which purport to bear on the validity or applicability of the Ordinance, however expressed, which purport to relate to Transfer's operations are fatally defective. The operations to which these Proposed Conclusions of Law relate are those which the Memorandum erroneously found to be

Transfer's operations; but the operations of Transfer which the Court should have found and to which the Ordinance as construed by the Court should be related are the undisputed services and actual operations under the Agency Contract of Transfer which are pleaded in Plaintiffs' Complaint.

11. Plaintiffs Except to the last sentence of Parmelee's Conclusions of Law numbered "4", which reads:

"Transfer is not at liberty to complain of potential arbitrary and unlawful administration of the ordinance until it has applied for and been improperly refused such license."

on the following grounds:

(a) This sentence (other than the word "improperly") repeats the language of a portion of the City's proposed Conclusions of Law numbered "3" and is objectionable on the grounds set forth in Plaintiffs' Exceptions thereto in the appropriate headings under Part One and Part Two thereof respectively;

(b) This sentence (with or without the word "improperly" contained therein) is objectionable on the following additional ground:

The Acting Corporation Counsel of the City of Chicago, one of the Defendants herein, publicly announced in a Chicago newspaper the following, of which this Court may take judicial notice. This announcement confirmed the facts set forth by Plaintiffs' Exceptions in their Exceptions (Part One pages 46-7(h)) with respect to maximum terminal license quota. The Chicago Daily Sun-Times of December 14, 1955 printed a story headed "Upholds Parmelee's Taxicab Service"; in which appeared the following:

"John C. Melaniphy, acting city corporation counsel, said the city would not act until officials had a chance to study Judge La Buy's formal order, expected several days hence.

"The question is," said Melaniphy, "if Railroad Transfers has to have vehicle licenses, can they be issued regardless of the fact that the taxi license quota set by the City Council is exhausted? The judge would have a right to order the city to issue the licenses as a matter of public convenience and necessity."

A photostatic copy of the heading of the first page and

of the third page of the issue is attached hereto as Exhibit 9; the original will be presented at the hearing on January 16th.

Plaintiffs suggest to this Court that should there be any question or doubt with respect to the fact of the continued and uninterrupted exhaustion of the maximum quota of terminal vehicle licenses at the effective date prior to October 1, 1955 of the Ordinance as amended on July 25, 1955 to the present time, this Court at the hearing on January 16, 1956 should inquire of that fact from the Acting Corporation Counsel or his representative attending that hearing.

12. Plaintiffs Except to Parmelee's Proposed Conclusion of Law numbered "4" on the following special ground:

This Conclusion of Law is responsive to this Court's findings of Law in the Memorandum.

556 The Memorandum offers no explanation or explainable ground for the Court's erasure of the last fifty years of rate making history under the Act to apply adjudicated case law of the period 1887 to 1906 during which this Section 1(4) was not in the Act, to the meager facts which the Court carved out of the Complaint for relation by the Ordinance as amended on July 26, 1955 as construed by the Court to reach the decisions announced by the Memorandum.

By so doing, the Memorandum has produced a situation so anomalous in the history of Federal jurisprudence as to require a critical review and reconsideration of the factual and legal basis of this Court's announced Findings in the Memorandum before the Court enters its final decision in this case.

The anomalous situation is created by the approach used in the Memorandum for the solution of the current problems arising with respect to the appropriate recognition of competent governmental authority in the field of regulation of the integrated national transportation system which the provisions of the Transportation Act of 1940 created for this country of ours, to reflect the constant and progressive advances in our civilization during the last fifty years.

This approach is that—as constant and progressive advances in civilization during the last half century have produced problems which cause headaches to the Judicial

arm of our Federal government, the thing for the Federal Court to do, is to erase that civilization so as to eliminate these headaches by throwing back to state governmental agencies the authority and obligation to solve these current problems through the philosophy of the prior period which reflected a mode of living which was doomed to extinction fifty years ago.

557

Conclusion.

The Memorandum is grounded on an untenable foundation of fact and law. The Memorandum has no place in the records of this Court.

Respectfully submitted,

Benjamin F. Goldstein,
Amos M. Mathews,

Attorneys for Plaintiff Terminal Lines.

Benjamin F. Goldstein,
Albert J. Meserow,

*Attorneys for Plaintiff Railroad
Transfer Service, Inc.*

Benjamin F. Goldstein,
209 South LaSalle Street,
Chicago 4, Illinois,
CEntral 6-7577.

Amos M. Mathews,
Room 280 Union Station Building,
Chicago 6, Illinois,
RAndolph 6-6900.

Albert J. Meserow,
231 South LaSalle Street,
Chicago 4, Illinois,
STate 2-8500.

558

Exhibit 8.

559 State of Illinois }
County of Cook } ss.

IN THE SUPERIOR COURT OF COOK COUNTY.

Parmelee Transportation Company, a corporation,

Plaintiff,

vs.

Earl D. Padrick, as agent for the Western Passenger Association, Chicago Terminal Lines — The Atchison, Topeka and Santa Fe Railway Company, The Baltimore and Ohio Railroad Company, The Chesapeake and Ohio Railway Company, Chicago & Eastern Illinois Railroad Company, Chicago and Northwestern Railway Company, Chicago Burlington & Quincy Railroad Company, Chicago Great Western Railway Company, Chicago Indianapolis and Louisville Railway Company, Chicago Milwaukee, St. Paul and Pacific Railroad Company, Chicago North Shore and Milwaukee Railway, Chicago, Rock Island and Pacific Railroad Company, Chicago South Shore and South Bend Railroad, Erie Railroad Company, Grand Trunk Western Railroad Company, Gulf, Mobile and Ohio Railroad Company, Illinois Central Railroad Company, Minneapolis, St. Paul and Sault Ste Marie Railroad Company, The New York Central Railroad Company, The New York, Chicago and St. Louis Railroad Company, The Pennsylvania Railroad Company, Wabash Railroad Company, The Baltimore and Ohio Chicago Terminal Railroad Company, Chicago and Western Indiana Railroad Company, and Chicago Union Station Company,

In
Equity

Defendants.

COMPLAINT.

Plaintiff, Parmelee Transportation Company, a corporation (hereinafter "Parmelee") by its Attorney Lee A.

Freeman, complains of the herein described defendants and states:

1. Plaintiff is a corporation organized and existing under and by virtue of the laws of the State of Delaware, and is duly qualified to do business in the State of Illinois. Plaintiff at all times material has owned and operated motor vehicles duly licensed by the City of Chicago under Chapter 28 of the Municipal Code of Chicago, to operate as public passenger terminal vehicles. By such licenses, plaintiff has been authorized to use the public streets and places in the City of Chicago in the rendition of its transfer services as hereinafter described. At all times material, plaintiff has fully complied with the police power requirements imposed by the city of Chicago in this connection to insure the public safety, convenience and welfare.

2. The status and certain relevant activities of the defendants are:

Earl D. Padrick, of Chicago, Illinois, was appointed and acted at all times material, and does now act, as agent for the Western Passenger Association, Chicago Terminal Lines.

Western Passenger Association, Chicago Terminal Lines is an unincorporated voluntary association of railroad and depot companies formed and organized by the railroads whose lines terminate in the city of Chicago, for the purpose among others of dealing with terminal and passenger transfer problems and procedures in the Chicago terminal area. The Western Passenger Association, Chicago Terminal Lines at all times material had been delegated authority by each of the member railroad and depot companies to act for and on its behalf in reaching understandings and agreements with plaintiff for the performance of transfer services in the Chicago terminal area.

The Atchison, Topeka and Santa Fe Railway Company is a railroad corporation organized in the State of Kansas.

560 The Baltimore and Ohio Railroad Company is a railroad corporation organized in the State of Maryland.

The Chesapeake and Ohio Railway Company is a railroad corporation organized in the State of Virginia.

Chicago and Eastern Illinois Railroad Company is a railroad corporation organized in the State of Indiana.

Chicago and Northwestern Railway Company is a railroad corporation organized in the State of Wisconsin.

Chicago, Burlington & Quincy Railroad Company is a railroad corporation organized in the State of Illinois.

Chicago Great Western Railway Company is a railroad corporation organized in the State of Illinois.

Chicago, Indianapolis and Louisville Railway Company is a railroad corporation organized in the State of Indiana.

Chicago, Milwaukee, St. Paul and Pacific Railroad Company is a railroad corporation organized in the State of Wisconsin.

Chicago, North Shore and Milwaukee Railway is a railroad corporation organized in the State of Illinois.

Chicago, Rock Island and Pacific Railroad Company is a railroad corporation organized in the State of Delaware.

Chicago, South Shore and South Bend Railroad is a railroad corporation organized in the State of Indiana.

Erie Railroad Company is a railroad corporation organized in the State of New York.

Grand Trunk Western Railroad Company is a railroad corporation organized in the States of Michigan and Indiana.

Gulf, Mobile and Ohio Railroad Company is a railroad corporation organized in the States of Alabama, Mississippi and Tennessee.

Illinois Central Railroad Company is a railroad corporation organized in the State of Illinois.

Minneapolis, St. Paul and Sault Ste. Marie Railroad Company is a railroad corporation organized in the State of Minnesota.

The New York Central Railroad Company is a railroad corporation organized in the States of Illinois, New York, Ohio, Indiana, Pennsylvania and Michigan.

The New York, Chicago and St. Louis Railroad Company is a railroad corporation organized in the States of Illinois, Ohio, New York, Pennsylvania and Indiana.

The Pennsylvania Railroad Company is a railroad corporation organized in the State of Pennsylvania.

Wabash Railroad Company is a railroad corporation organized in the State of Ohio.

Each of the railroads, defendant herein, does business in the State of Illinois and all of said railroads are hereinafter collectively referred to as "Chicago Terminal Railroads".

The Baltimore and Ohio Chicago Terminal Railroad Company is a corporation organized in the State of Illinois which owns and operates the Grand Central Station in the city of Chicago.

The Chicago and Western Indiana Railroad Company is a corporation organized in the State of Illinois which owns and operates the Dearborn Street Station in the city of Chicago.

The Chicago Union Station Company is a corporation organized in the State of Illinois which owns and operates the Union Station in the city of Chicago.

3. There are eight (8) railroad terminal stations located in the downtown area of the city of Chicago into which some twenty-one (21) railroads operate and terminate their passenger services. Railroad travel through Chicago (except for minor instances) requires a change of trains from the incoming line to the outbound line. In some instances connecting carriers use the same railroad terminal station, in which case, no transfer of passengers and their baggage between stations is required. In most instances, however, the connecting carriers use different railroad terminal stations thus necessitating transfer between stations.

4. The Chicago Terminal Railroads are each common carriers as defined in Part I of the Interstate Commerce Act. Pursuant to the duty imposed by Section 1 (4) of that Act through routes and reasonable joint rates have been established for railroad trips through Chicago involving connecting carriers in the Chicago terminal area with respect to said through routes and to meet the competition of connecting carriers using the same terminal station. The Chicago Terminal Railroads have provided by their tariffs for motor vehicles transfer between terminal stations by the issuance of transfer coupons on through tickets involving different terminal stations in Chicago. In such instances the transfer services and the charges made therefor were and are included in the established joint fares whether separately collected or not. At all times material Section 1 (4) of the Interstate Commerce Act provided in this respect:

"It shall be the duty of every common carrier * * * engaged in the transportation of passengers or property * * * to establish through routes and just and reasonable rates, fares and charges applicable there-

to, and to provide reasonable facilities for operating through routes and to make reasonable rules and regulations with respect to the operation of through routes, and providing reasonable compensation to those entitled thereto; * * *"

5. The plaintiff and its predecessors in interest for over 102 years have operated as a so-called transfer company for the Chicago Terminal Railroads. Plaintiff's operations have been conducted by means of limousines and motor trucks and have included the following functions:

(a) Transfer of passengers and accompanied hand baggage between railroad terminal stations;

(b) Transportation of passengers and accompanied hand baggage to passenger selected destinations in the downtown area of Chicago;

(c) Transfer of checked-through hand baggage and trunks between railroad terminal stations. Such baggage is handled by motor trucks separately from passenger transfer.

(These three functions will hereinafter sometimes be referred to as "transfer services".)

6. During the period from January 1, 1935 to on or about September 30, 1955, the Chicago Terminal Railroads in order to provide reasonable facilities for the through routing of passengers and baggage in Chicago as required by Section 1 (4) of the Interstate Commerce Act, continuously engaged plaintiff to transfer passengers and accompanying baggage between railroad terminal stations or from railroad terminal stations to passenger designated downtown Chicago destinations, and to transfer checked-through baggage and trunks between railroad terminal stations. These transfer services were rendered under agreements entered into by plaintiff with the various Chicago Terminal Railroads and with the Western 562 Passenger Association Chicago Terminal Lines for and on behalf of each of the defendants. By these agreements, the Chicago Terminal Railroads engaged plaintiff to render said transfer services and agreed that no other person, firm or corporation would be granted any right or privilege in connection with, or be engaged or permitted to perform such transfer services in Chicago on their behalf. Plaintiff under said agreements was required

to meet all trains and to provide sufficient facilities and personnel available at all times to transfer all passengers and their accompanying or checked-through baggage, to whom Chicago transfer coupons were sold or issued on through or combination railroad tickets.

7. Said agreements required plaintiff to acquire, operate and maintain buildings, structures, vehicles, equipment and facilities specially designed for and dedicated to such transfer services and to secure and establish trained and continuously supervised special personnel in the rendition of such transfer services, which services were required to be adequate, reliable and dependable. During all times material, plaintiff rendered adequate, reliable and dependable transfer services at reasonable rates and charges and at all times made available sufficient buildings, structures, vehicles, equipment, facilities and trained and efficient personnel to conveniently handle all transfer traffic which might be presented, in fulfillment of all terms and conditions of its agreements with each of the defendants.

8. Under said agreements, the obligation of each of the Chicago Terminal Railroads to provide payment to plaintiff for the transfer services rendered or made available was fixed at an agreed upon charge per transfer coupon to be paid by the outbound carrier. The applicable rates of compensation for transfer coupons have been fixed by agreements from time to time, such rates being as follows for the period since January 1, 1935:

Commencing	Adults	Children, Charity, Clergy and other half fares (where applicable)	Military Furlonghees
January 1, 1935.....	\$.75	\$.375	\$ —
February 10, 1942....	.85	.425	—
July 1, 1942.....	.85	.425	.60
July 1, 1945.....	.85	.425	.50
January 1, 1948.....	1.00	.50	.50
September 1, 1951....	1.00	.50	.80
June 1, 1952.....	1.05	.525	.85
January 1, 1954.....	1.125	.5625	.85
April 1, 1954.....	1.20	.60	.85
October 1, 1954.....	1.22	.61	.85

These specified charges applied whether plaintiff performed all of the services possible for each passenger com-

prising the meeting of all trains, the transfer of the passenger, his accompanying baggage plus his checked-through baggage; or only a part of such transfer services (with the exception of a special rate of 50 cents per capita established on December 1, 1942 for the transfer of military baggage in situations where the military personnel involved were carried through Chicago by switching operations on a single train).

9. At all times material the Chicago Terminal Railroads retained and exercised complete control over and domination of the entire system, practice and procedure of issuing, selling, identifying, collecting and accounting for Chicago transfer coupons. Under said agreements all such transfer coupons were issued or sold by agents of originating railroads located throughout the United States at the time through or combination railroad tickets were sold, and the Chicago Terminal Railroads represented and warranted to plaintiff that:

(a) At the time of issuance, in the event baggage 563 was checked-through by the passenger, the issuing railroad agent would be required to and would punch the transfer coupon "BC" to afford plaintiff appropriate compensation.

(b) In all instances where a passenger checked-through his baggage and failed to use the plaintiff's limousine transfer service in Chicago, the agent of the outbound carrier would be required to and would collect his transfer coupon and such carrier would be required to and would report to plaintiff the total and accurate number of such coupons collected, as a basis for the receipt of payment for the service rendered of transferring checked-through baggage between stations.

Plaintiff was required by its agreements with the Chicago Terminal Railroads to accept all checked-through baggage and handle such baggage efficiently and dependably. But unless a passenger presented his transfer coupon at the time he personally used the plaintiff's limousine services, or the transfer coupon was properly punched by the issuing carrier and properly collected and accounted for by the outbound carrier, under the agreed system and method, the plaintiff would be unjustly deprived of compensation for transferring checked-through baggage for

which it was entitled to receive the full transfer coupon charge, and would be wholly without means of ascertaining that it had been deprived of such compensation.

Under said system and method of issuing, selling, identifying, collecting and accounting for such Chicago transfer coupons, plaintiff was repeatedly induced and required to and did repose special confidence and trust in each of said Chicago Terminal Railroads to properly and accurately issue, sell, punch, identify, collect, account to and pay plaintiff for each and every Chicago transfer coupon sold or issued which entitled the passenger to use the plaintiff's transfer services. By reason thereof, the Chicago Terminal Railroads occupied a fiduciary position toward the plaintiff and were required to exercise a high degree of care to assure the integrity and accuracy of the railroad transfer coupon system so that plaintiff would receive its full measure of agreed upon compensation.

10. Notwithstanding the fiduciary obligation placed upon and assumed by the Chicago Terminal Railroads to assure the integrity and accuracy of the railroad transfer coupon system, and contrary to and in violation of their agreements with plaintiff, the Chicago Terminal Railroads, although frequently requested so to do and although purporting to comply with plaintiff's requests so to do, have failed to issue, punch, identify, collect and account for a large and substantial volume of transfer coupons upon which baggage was checked-through and for which plaintiff performed transfer services.

From time to time during the period here involved, some of the Chicago Terminal Railroads and the Western Passenger Association, Chicago Terminal Lines acting on their behalf have admitted that large and substantial amounts of transfer coupons issued and for which baggage was actually transferred by the plaintiff either had not been punched "BC" or otherwise properly identified, or if so punched or identified, had not been collected and accounted for to the plaintiff. Notwithstanding such admissions and, in some instances, their subsequent accounting for a portion of such coupons, the defendants during and throughout said entire period have concealed and withheld from the plaintiff, facts and information known or readily available to them establishing the true amount and volume of transfer coupons in respect of which the plaintiff had rendered transfer services but for which no cou-

pons were collected by the plaintiff and no accounting
564 therefor or report thereof was made to the plaintiff.

11. Contrary to and in violation of their agreements with plaintiff, their fiduciary obligations toward plaintiff and their obligations under Section 1 (4) of the Interstate Commerce Act, the Chicago Terminal Railroads although frequently requested so to do, have failed and refused and continue to fail and refuse to account to and pay plaintiff for all of the transfer coupons sold or issued as aforesaid for which transfer services were rendered and made available. Plaintiff has thereby been deprived of large sums of money constituting its reasonable and agreed compensation. The exact amounts of such sums of money due and owing to plaintiff are unknown to plaintiff for the reasons aforesaid. Plaintiff is informed and believes and upon such information and belief alleges that upon an accounting by defendants there will be found due to plaintiff by reason of transfer coupons issued and for which transfer services were rendered and made available by plaintiff, but for which payment to plaintiff has been improperly withheld, an amount in excess of \$7,000,000.00.

12. Notwithstanding the agreements by the Chicago Terminal Railroads to utilize plaintiff's services and facilities in the transfer of passengers and baggage in Chicago and not to engage or permit any other person, firm or corporation to perform such transfer services on behalf of any of them, and notwithstanding that the rate of compensation per transfer coupon was in part fixed in consideration of the volume of transfer traffic handled by plaintiff, the Chicago Terminal Railroads in breach of said agreements and in violation of the terms thereof jointly and severally have repeatedly and wilfully diverted or caused to be diverted a large volume of transfer traffic in Chicago to other persons, firms or corporations engaged by them and have thus deprived plaintiff of substantial revenues which were properly due plaintiff and to which it was entitled under its agreements with them. Plaintiff has been obliged to incur the costs and expenses of providing and maintaining in readiness for service, structures, vehicles, equipment and personnel to handle traffic for which transfer coupons were actually issued and sold by the defendants, but which was diverted from the plaintiff as the direct result of said wilful violations and breaches

of said agreements. In many instances, passenger transfer traffic was improperly diverted from the plaintiff, without its knowledge, but checked-through baggage for such passengers was handled by plaintiff in ignorance of the circumstance that no provision was being made for the collection or receipt of the agreed upon compensation. Plaintiff does not have knowledge of the exact amounts of revenues of which it has thus been improperly deprived, but is informed and believes and upon such information and belief alleges that upon an accounting by defendants there will be found due to plaintiff by reason of such improper diversion of traffic, an amount in excess of \$1,500,000.00.

13. At all times material, defendants were in a position of special trust and confidence toward plaintiff and had an obligation as a fiduciary to account to plaintiff for all transfer coupons sold or issued and pay plaintiff the agreed compensation for its services rendered in respect thereof and also to account to plaintiff and pay plaintiff for all transfer traffic improperly diverted from plaintiff in breach of and in violation of the terms of said agreements.

Prior to the commencement of this action plaintiff duly demanded of defendants that they account for their acts as aforesaid, and pay over to plaintiff the amounts due and owing, but defendants have failed and refused so to do and wilfully persist in such failure and refusal.

565 The multiple transaction and multiple parties here involved require the adjudication of accounts of a complicated character.

Plaintiff has no adequate remedy at law.

Wherefore, plaintiff prays:

A. That this court enter a decree requiring each defendant to account to plaintiff for all of said thru or combination tickets sold and to account to and pay over to plaintiff the agreed upon compensation for each of said transfer coupons sold or issued during the period of time hereinbefore alleged, less only credits by reason of payments already made to plaintiff.

B. That this court enter a decree requiring each defendant to account to plaintiff for all transfer business which such defendants have improperly diverted from plaintiff as heretofore alleged.

C. That after hearing, this court enter a decree requiring defendants jointly and severally, as their respective interests shall be made to appear, to pay over to plaintiff the sum of \$8,500,000.00 by reason of the accounting, damages and losses heretofore described.

D. That the court make such other findings and grant such other and further relief as to this court may seem equitable and appropriate in the premises.

Attorney for Plaintiff.

Lee A. Freeman
Attorney for Plaintiff
208 S. LaSalle Street
CE 6-1763

State of Illinois }
County of Cook } ss

Charles E. Rheintgen, being first duly sworn on oath deposes and says that he is the Vice President of Parmelee Transportation Company, a corporation, plaintiff herein; that he is authorized to act on behalf of plaintiff; that he has read the within and foregoing Complaint, by him subscribed; that he knows the contents thereof and that the same are true in substance and in fact, except where stated to be under information and belief and as to those statements, he verily believes them to be true.

Subscribed and sworn to before me this _____ day of _____, A.D. 1955.

Notary Public.

(149)

CHICAGO DAILY SUN-TIMES

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WEDNESDAY, DECEMBER 14, 1955

CHICAGO SUN-TIMES, WEDNESDAY, DECEMBER 14, 1955 • 3

Upholds Parmelee's Taxicab Service

A city ordinance permitting Parmelee Transportation Co. to operate a special type of taxi service has been upheld by Judge Walter J. La Buy in U. S. District Court.

His ruling was a blow at the operations of the new Railroad Transfer Service, which took over hauling of passengers between railroad stations from Parmelee.

The new firm does not hold the public vehicle licenses required by the ordinance—enacted last July 26—which are held by Parmelee.

Attorneys for Railroad Transfer indicated Tuesday they would appeal to the U.S. Court of Appeals. This would stay the city from enforcing the recent ordinance by ruling Railroad Transfer vehicles off the streets.

Judge La Buy also held that

Railway Transfer is not operating in interstate commerce and, therefore, is subject to city ordinances. The new firm's attorneys, Benjamin F. Goldstein and Albert Meserow, had argued that the service was interstate commerce and, therefore, subject only to federal laws.

The firm was organized by John L. Keeshin, veteran trucking executive; at the request of railroads using the Chicago passenger stations.

The case was a factor in a Senate subcommittee investigation of the affairs of Hugh W. Cross, who subsequently resigned as chairman of the Interstate Commerce Commission.

Cross, a former lieutenant governor of Illinois, was accused of indiscreet conduct in holding conversations with rail-

road representatives prior to the signing of the Railroad Transfer contract.

Railroad Transfer and 21 railroads had sought a temporary injunction against the city ordinance, which Judge La Buy denied.

Lee A. Freeman, Parmelee general counsel, called the verdict "a complete vindication of our position."

John C. Melaniphy, acting city corporation counsel, said the city would not act until officials had a chance to study Judge La Buy's formal order, expected several days hence.

"The question is," said Melaniphy, "if Railroad Transfers has to have vehicle licenses, can they be issued, regardless of the fact that the taxi license quota

set by the City Council is exhausted? The judge would have a right to order the city to issue the licenses as a matter of public convenience and necessity."

Later, at a hearing before the Illinois Commerce Commission, Freeman obtained a continuance till March 16 on Parmelee's petition for a certificate to operate a baggage and passenger carrier service among the railroad stations.

The continuance was asked in view of other litigation involved in the battle between the two transfer companies.

(566)

567

Certificate of Service.

I hereby certify that I have this day served the foregoing document upon the following named counsel by mailing copies to them by first-class United States mail, postage prepaid as follows:

To Joseph F. Grossman,
Special Assistant Corporation Counsel,
City of Chicago,
City Hall,
Chicago, Illinois,
Attorney for Defendants,
City of Chicago, et al.

To Lee A. Freeman,
105 South La Salle Street,
Chicago, Illinois,
Attorney for Intervenor,
Parmelee Transportation Co.

Dated at Chicago, Illinois January 11, 1956.

Amos M. Mathews,
Attorney for Plaintiffs.

568 And afterwards on, to wit, the 12th day of January, 1956 there was filed in the Clerk's office of said Court a certain Memorandum in words and figures following, to wit:

569 IN THE UNITED STATES DISTRICT COURT.
* * (Caption—55-C-1883) * *

SUPPLEMENTAL MEMORANDUM.

The court has considered the objections and exceptions to the defendants' proposed Findings of Fact, Conclusions of Law, and Order for Summary Declaratory Judgment and also plaintiffs' suggested Findings of Fact as well as the numerous criticisms of the court's memorandum.

Plaintiffs urge that the court's failure to refer and consider §1(4) of the Interstate Commerce Act and also §15(3) thereof render its decision void. Page 2 of the court's memorandum cites certain statutory sections as follows:

"§1(3), §4, §3(4)". The inclusion of §4 stems from a typographical error and it is corrected to refer to the proper section; that is §1(4).

From this error counsel for plaintiffs contend that the court erroneously relied upon cases, cited on pages 12-13 of its memorandum, which do not reflect the statutory obligation of carriers with respect to through routes and therefore its conclusion on the character of public utility operations and, in fact, the entire decision is without basis in law.

Concededly, neither §1(4) nor §15(3) were a part of the Interstate Commerce Act when the cited cases were determined. Section 1(4) by its terms imposes a "duty" upon railroads to furnish transportation upon reasonable request and to establish reasonable through routes with other carriers. Section 15(3), in general, grants to the Interstate Commerce Commission the power to establish through routes when it shall find, after hearings, that such routes are necessary in the public interest. The cases cited, and decided before 1906, indicate that railroads could not be compelled to establish through routes. By §15(3) authority is vested in the Interstate Commerce Commission to compel the establishment of through routes. Counsel conclude that insofar as these earlier cases show no statutory "duty" or compulsion upon carriers to establish through routes, they are inapplicable; that under §1(4) carriers are required to make such arrangements; that these arrangements are no longer dependent upon voluntary negotiations between the carriers, but that §1(4) compels a carrier, without order of the Commission, to establish such through routes. In *Thompson v. United States*, (1951) 343 U. S. 549, 555, the Supreme Court of the United States stated as follows:

"Under the Interstate Commerce Act, a carrier must not only provide transportation service at reasonable rates over its own line but has the additional duty 'to establish reasonable through routes with such other carriers, and just and reasonable rates * * * applicable thereto.' Through routes may be and ordinarily are, established by the voluntary action of connecting carriers. Since 1906, through routes may, also be established by the order of the Interstate Commerce Commission, * * *"

Thus, the "duty" contained in § 1(4) to establish through routes is usually exemplified, and continues to be the subject of voluntary action between the railroads as are the arrangements in the case at bar. Through routes are still matters created by voluntary action of the carriers, but since 1906 the Interstate Commerce Commission has the power under § 15(3) to compel such action where public necessity requires it.

Plaintiffs contend this "duty" under § 1(4) extends to providing interstation transfer for through passengers as an integral and essential part of the reasonable facilities for through routes. The tariff filed as an exhibit shows that not all railroads with through routes have arranged for interstation transfer of through passengers. The Interstate Commerce Commission noted this fact in *Status of Parmelee* (1953), 288 I. C. C. 95, as follows:

571 "A survey made by the respondent disclosed that there are approximately 400 points in the United States where passengers and their baggage are transferred between stations by local transfer companies for railroads. * * * There are numerous points, throughout the country, however, where the railroads have not assumed the responsibility for providing free transfer service and no such arrangements are maintained by them at those points. Although through tickets by way of those points are sold by the railroads, passengers traveling over such routes are required, by appropriate tariff provisions, to make their own transfer arrangements."

Interstation transfer arrangements in Chicago have been established voluntarily for business purposes in order to meet the competition of through routes over railroads operating out of common terminals. The court is of the opinion § 1(4) relating to through routes and § 3(4) relating to reasonable facilities for the interchange of traffic do not require the railroads to provide the transfer service between railroad terminals.

A further correction should be made with reference to the evidence considered on the motion for injunction to include reference to and consideration of the affidavits filed by the plaintiffs. The first sentence in the last para-

graph on page 10 of the memorandum is deleted and corrected to read as follows:

"The allegations of the verified complaint and all affidavits submitted by plaintiff are the basis for its application for injunctive relief."

In all other respects the court adheres to its memorandum of December 12, 1955 as filed.

Walter J. LaBuy,

Judge, United States District Court.

January 12, 1956.

Messrs. Benjamin F. Goldstein and

Albert J. Meserow,

209 S. LaSalle (4),

Amos M. Mathew, Esquire,

280 Union Station (6),

John C. Melaniphy,

Corporation Counsel,

City Hall,

Lee A. Freeman, Esquire,

105 S. LaSalle.

572 And on the same day, to wit, on the 12th day of January, 1956, being one of the days of the regular January term of said Court, in the record proceedings thereof, in said entitled cause, before the Honorable Walter J. La Buy, District Judge, appears the following entry, to wit:

573

IN THE UNITED STATES DISTRICT COURT.

* * (Caption—55-C-1883) * *

This cause coming on to be heard upon the verified complaint, the verified petition of Parmelee Transportation Company to intervene as a defendant, the plaintiffs' motion for preliminary injunction, the motion of defendant City of Chicago for summary judgment, and the court having also considered the affidavits and exhibits of all parties, together with the briefs and arguments of counsel, hereby enters the following Findings of Fact and Conclusions of Law:

FINDINGS OF FACT.

1. Railroad Transfer Service, Inc., (hereinafter "Transfer"), one of the plaintiffs herein, has entered into a five year contract with plaintiff railroad companies (hereinafter "Terminal Lines") under which Transfer as an independent contractor has undertaken to transport by its motor vehicle operated under its direction and control passengers traveling through Chicago between railroad stations within the Chicago terminal area. Under said contract the parties agreed that Transfer shall exclusively service and transport between railroad stations passengers holding transfer coupons.

2. Terminal Lines provide interstation transfer services in Chicago as a means of meeting the competition of other railroad routings through Chicago involving only a single terminal station and, therefore, which do not require interstation transfers. Similar provisions for transfer of passengers between stations have been provided by railroads in other terminal areas, although in many such terminal areas passengers are required to make their own transfer arrangements between terminal stations even though traveling on through railroad tickets.

3. Transfer collects transfer coupons previously issued or sold to passengers by the railroads pursuant to tariffs applicable to joint fares published by the Commission and the Illinois Commerce Commission. Transfer is not a participant in such tariffs published by the railroads. The transfer coupons are redeemed by the outgoing Terminal Lines at rates of compensation fixed by said contract.

4. Transfer's operations began on October 1, 1955. Its operations are conducted over city streets and public places and are confined to the transportation for hire entirely within the City of passengers possessing through route railroad tickets covering trips between points outside and beyond the corporate limits of the City. More than 99% of all such through passenger service is in interstate commerce.

5. Chapter 28 of the Municipal Code of Chicago, as amended (hereinafter "Ordinance") a copy of which is attached to the complaint as Exhibit B, was passed by the City Council of the city of Chicago and became effective prior to October 1, 1955. The Ordinance provides for the licensing of four classes of public passenger vehicles, one

of which is designated as a terminal vehicle. Such licenses are issued, upon application, by the City Public Vehicle Commissioner if, upon investigation, he finds that the applicant is of proper character and reputation as a law-abiding citizen; that he has the requisite financial ability to render safe and comfortable transportation service, to maintain and replace the equipment for such service and to pay all judgments and awards which may be rendered for any cause arising out of the operation of a public passenger vehicle during the license period; that the vehicles proposed to be used are in safe operating condition with adequate body and seating facilities; and that adequate public liability and property damage insurance is provided.

6. Section 28-1 of the Ordinance defines "Public Passenger Vehicle" and "Terminal Vehicle" as follows:

575 "Public Passenger vehicle" means a motor vehicle, as defined in the Motor Vehicle Law of the State of Illinois, which is used for the transportation of passengers for hire, excepting those devoted exclusively for funeral use or in operation of a metropolitan transit authority or public utility under the laws of Illinois.

"Terminal vehicle" means a public passenger vehicle which is operated exclusively for the transportation of passengers from railroad terminal stations and steamship docks to points within the area defined in Section 28-31.

7. Section 28-2 of the Ordinance is in part as follows:

"License required. It is unlawful for any person other than a metropolitan transit authority or public utility to operate any vehicle, or for any such person who is the owner of any vehicle to permit it to be operated, on any public way for the transportation of passengers for hire from place to place within the corporate limits of the city, except on a funeral trip, unless it is licensed by the city as a public passenger vehicle."

All of the terminal stations of Terminal Lines and Steamship docks are located in the area described in Section 28-31.

8. Sections 28-31.1 and 28-31.2 provide as follows:

"28-31.1 Public convenience and necessity. No li-

cense for any terminal vehicle shall be issued except in the annual renewal of such license or upon transfer to permit replacement of a vehicle for that licensed unless, after a public hearing held in the same manner as specified for hearings in Section 28-22.1, the commissioner shall report to the council that public convenience and necessity require additional terminal vehicle service and shall recommend the number of such vehicle licenses which may be issued.”

“In determining whether public convenience and necessity require additional terminal vehicle service due consideration shall be given to the following:

1. The public demand for such service;
2. The effect of an increase in the number of such vehicles on the safety of existing vehicular and pedestrian traffic in the area of their operation;
3. The effect of an increase in the number of such vehicles upon the ability of the licensee to continue rendering the required service at reasonable fares and charges to provide revenue sufficient to pay for all costs of such service, including fair and equitable wages and compensation for licensee's employees and a fair return on the investment in property devoted to such service;

4. Any other facts which the commissioner may deem relevant.

If the commissioner shall report that public convenience and necessity require additional terminal vehicle service, the council, by ordinance, may fix the maximum number of terminal vehicle licenses to be issued not to exceed the number recommended by the commissioner.

28-31.2 Local Fares. The rate of fare for local transportation of every passenger in terminal vehicles of the licensee shall be uniform, regardless of the distance traveled; provided that children under 12 years of age, when accompanied by an adult, shall be carried at not more than half fare. Such rates of fare shall be posted in a conspicuous place or places within each vehicle as determined by the commissioner.”

9. Transfer has not applied for nor sought licenses from the City of Chicago to operate its vehicles for hire over the city streets and public places as Public Passenger Vehicles of the Terminal Vehicle category.

577 10. Except as to maximum hours of service of employees, the Interstate Commerce Commission has not undertaken to exercise any supervision or regulatory control of the services performed by Transfer or the safety of its operation and equipment.

Conclusions of Law.

1. This court has jurisdiction of the subject matter and of the parties herein by virtue of Section 1331 and 1337 of the Judicial Code, 28 U. S. C. A., granting to district courts original jurisdiction of civil actions arising under the Constitution and laws of the United States involving a sum in excess of the requisite jurisdictional amount.

2. There is no genuine issue of fact involved in this controversy.

3. Transfer is not a public utility under the laws of Illinois and does not devote its vehicles exclusively to the operation of a public utility under the laws of Illinois.

4. Transfer owns and operates Public Passenger Vehicles of the Terminal Vehicle category, as defined in Section 28-1 of the Ordinance.

5. Transfer operates its motor vehicles on public ways of the City for the transportation of passengers for hire from place to place within the corporate limits of the City as provided in Section 28-2 of the Ordinance.

6. Chapter 28 of the Ordinance is a proper exercise of police power by the City in the interest of the safety, health and welfare of the public. The federal government has not undertaken to regulate the subjects over which the City has thus exercised its police power. The Congress of the United States has not indicated an intention to preclude local controls in this field. The imposition upon Transfer of reasonable city regulations and controls appropriate to the public safety, health and welfare does not constitute an invalid or unconstitutional burden upon interstate commerce.

7. The Ordinance does not grant the Public Vehicle License Commissioner and the City Council an arbitrary right to refuse a terminal vehicle license. It confers a discretionary power to grant or withhold such license under the police power delegated by the city

578

to control traffic on the city streets and for other purposes in the interest of public health, safety and welfare.

Walter J. LaBuy,
Judge, United States District Court.

January 12, 1956.

Messrs. Benjamin F. Goldstein and
Albert J. Mezerow,
209 S. La Salle (4),

Amos M. Mathew, Esquire,
280 Union Station (6);

Lee A. Freeman, Esquire,
208 S. La Salle,

John C. Melaniphy,
Corporation Counsel,
City Hall.

579

IN THE UNITED STATES DISTRICT COURT.

* * * (Caption—55-C-1883) * * *

JUDGMENT ORDER.

This cause coming on to be heard upon the verified complaint, the verified petition of Parmalee Transportation Company to intervene as a defendant, the plaintiffs' motion for preliminary injunction, the motion of defendant City of Chicago for summary judgment, and the court having also considered the affidavits and exhibits submitted by all parties, together with the briefs and arguments of counsel, and being fully advised in the premises, it is hereby

Ordered, Adjudged And Decreed that the motion of plaintiffs for a preliminary injunction restraining the defendants City of Chicago and its officers from enforcing or attempting to enforce the provisions of Chapter 28 of the Municipal Code of Chicago against the plaintiff, Railroad Transfer Service, Inc., be and it is hereby denied;

It Is Further Ordered, Adjudged And Decreed that the temporary restraining order heretofore entered by this court on October 24, 1955, extended from time to time, be and it is hereby dissolved;

It Is Further Ordered, Adjudged And Decreed that summary judgment be entered in favor of the defendants against the plaintiffs, with costs, and that this action be and it is hereby dismissed.

Walter J. La Buy,

Judge, United States District Court.

January 12, 1956.

580 And afterwards on, to wit, the 13th day of January, 1956 came the Plaintiffs by their attorneys and filed in the Clerk's office of said Court their certain Notice of Appeal (Certificate of Mailing attached thereto) in words and figures following, to wit:

581

IN THE UNITED STATES DISTRICT COURT,
Northern District of Illinois,
Eastern Division.

The Atchison, Topeka and Santa Fe Railway Company; The Baltimore and Ohio Railroad Company; The Chesapeake and Ohio Railway Company; Chicago & Eastern Illinois Railroad Company; Chicago and North Western Railway Company; Chicago, Burlington & Quincy Railroad Company; Chicago Great Western Railway Company; Chicago, Indianapolis and Louisville Railway Company; Chicago, Milwaukee, St. Paul and Pacific Railroad Company; Chicago North Shore and Milwaukee Railway; Chicago, Rock Island and Pacific Railroad Company; Chicago South Shore and South Bend Railroad; Erie Railroad Company; Grand Trunk Western Railroad Company; Gulf, Mobile and Ohio Railroad Company; Illinois Central Railroad Company; Minneapolis, St. Paul & Sault Ste. Marie Railroad Company; The New York Central Railroad Company; The New York, Chicago and St. Louis Railroad Company; The Pennsylvania Railroad Company; Wabash Railroad Company; and Railroad Transfer Service, Inc., corporations,

Plaintiffs,

vs.

City of Chicago, a municipal corporation; Richard J. Daley, not individually but as Mayor of said city; John C. Melaniphy, not individually but as Acting Corporation Counsel of said city; Timothy P. O'Connor, not individually but as Commissioner of Police of said city, and William P. Flynn, not individually but as Public License Commissioner of said city,

Defendants.

Civil Action
No. 55-C-
1883.

Equitable
Relief
Demanded.

NOTICE OF APPEAL.

582 Notice is hereby given that The Atchison, Topeka and Santa Fe Railway Company; The Baltimore and Ohio Railroad Company; The Chesapeake and Ohio Railway Company; Chicago & Eastern Illinois Railroad Company; Chicago and North Western Railway Company; Chicago, Burlington & Quincy Railroad Company; Chicago Great Western Railway Company; Chicago, Indianapolis and Louisville Railway Company; Chicago, Milwaukee, St. Paul and Pacific Railroad Company; Chicago North Shore and Milwaukee Railway; Chicago, Rock Island and Pacific Railroad Company; Chicago South Shore and South Bend Railroad; Erie Railroad Company; Grand Trunk Western Railroad Company; Gulf, Mobile and Ohio Railroad Company; Illinois Central Railroad Company; Minneapolis, St. Paul & Sault Ste. Marie Railroad Company; The New York Central Railroad Company; The New York, Chicago and St. Louis Railroad Company; The Pennsylvania Railroad Company; Wabash Railroad Company; and Railroad Transfer Service, Inc., plaintiffs above-named, hereby appeal to the United States Court of Appeals for the Seventh Circuit from the judgment order entered in this action on January 12, 1956.

Benjamin F. Goldstein,
209 South La Salle Street,
Chicago 4, Illinois,
CEntral 6-7577,

Amos M. Mathews,
Room 280, Union Station Building,
Chicago 6, Illinois,
RAndolph 6-6900.

583

Albert J. Meserow,
231 South LaSalle Street,
Chicago 4, Illinois,
STate 2-8500,

Attorneys for Plaintiffs-Appellants above named.

584 United States of America, }
Northern District of Illinois. } ss:

* * (Caption—55-C-1883) * *

CERTIFICATE OF MAILING.

I, Roy H. Johnson, Clerk of the United States District Court for the Northern District of Illinois, do hereby certify that on January 13, 1956, in accordance with Rule 73(b) of the Federal Rules of Civil Procedure, a copy of the foregoing Notice of Appeal was mailed to:

Joseph F. Grossman, Special Assistant Corporation
Counsel,
City of Chicago,
City Hall, Chicago 2, Illinois.

Lee A. Freeman,
208 S. La Salle Street,
Chicago 4, Illinois.

In Testimony Whereof, I have hereunto subscribed my name and affixed the seal of the aforesaid Court at Chicago, Illinois, this 13th day of January, 1956.

Roy H. Johnson,

Clerk,

By Gizella Butcher,

Deputy Clerk.

(Seal)

590 And on the same day, to wit, on the 13th day of January, 1956, being one of the days of the regular January term of said Court, in the record of proceedings thereof, in said entitled cause, before the Honorable Walter J. La Buy, District Judge, appears the following entry, to wit:

591 IN THE UNITED STATES DISTRICT COURT.
* * (Caption—55-C-1883) * *

ORDER FOR INJUNCTION DURING
PENDENCY OF APPEAL.

This action coming on for hearing before the Court upon the motion of Plaintiffs-Appellants for injunction during pendency of appeal, and the Court being duly advised in the premises,

It Is Ordered, that during the pendency of the appeal in this action to the Court of Appeals of the Seventh Circuit, the defendants, City of Chicago, a municipal corporation, Richard J. Daley, Mayor of said city, John C. Melaniphy, Acting Corporation Counsel of said city, Timothy J. O'Connor, Police Commissioner of said city, and William P. Flynn, Public Vehicle License Commissioner of said city, and their agents, officers, servants, employees and attorneys, and any persons acting in concert with or participating with them, and any and all persons acting, by, with, through or under them, or by or through their
592 order, be, and they hereby are enjoined and restrained from enforcing or attempting to enforce Chapter 28 of the Municipal Code of Chicago (commonly known as the "Public Passenger Vehicle" Ordinance) against the Plaintiffs-Appellants or against the officers, agents, servants or employees of the aforesaid Plaintiffs-Appellants.

It Is Further Ordered, that the aforesaid Plaintiffs-Appellants shall file supersedeas bond herein in the penal sum of \$50,000, conditioned as required by law to save the Appellees harmless in the event the Plaintiffs-Appellants do not make good their appeal.

This Order issued at 2:13 o'clock P. M., this 13th day of January, 1956.

Walter J. La Buy,
United States District Judge.

597 And afterwards on, to wit, the 23rd day of January, 1956 came the Plaintiffs-Appellants by their attorneys and filed in the Clerk's office of said Court their certain Designation of Contents of Record in words and figures following, to wit:

598 IN THE UNITED STATES DISTRICT COURT.
* * (Caption—55-C-1883) * *

DESIGNATION OF CONTENTS OF
RECORD ON APPEAL.

Pursuant to Rule 75(a) of the Federal Rules of Civil Procedure, the plaintiffs-appellants hereby designate the following for inclusion in the record on appeal to the United States Court of Appeals for the Seventh Circuit, taken by notice of appeal filed on January 13, 1956, the same being the complete record and all the proceedings and evidence in this action:

(1) Statement required by Rule No. 10(b) of the United States Court of Appeals for the Seventh Circuit.

(2) Plaintiffs' Complaint.

599 (3) Plaintiffs' motion for a temporary restraining order, and affidavits of H. B. Siddall and Alex Baxter attached thereto.

(4) Temporary restraining order, notice and order to show cause, entered October 24, 1955.

(5) Motion of Parmelee Transportation Company to Intervene as a Defendant.

(6) Petition of Parmelee Transportation Company to Intervene as a Defendant.

(7) Order Extending Temporary Restraining Order, entered October 28, 1955.

(8) Order Extending Temporary Restraining Order, entered November 7, 1955.

(9) Memorandum and order granting Parmelee Transportation Company leave to intervene.

(10) Affidavit of Leonard H. Bass, filed by Parmelee Transportation Company.

(11) Affidavit of Charles E. Rheintgen, filed by Parmelee Transportation Company.

(12) Plaintiffs' brief in support of temporary injunction.

(13) Order Extending Temporary Restraining Order, entered November 10, 1955.

(14) Memorandum of Intervenor, Parmelee Transportation Company, In Opposition to Motion for Temporary Injunction.

(15) Motion of Defendants for Summary Judgment.

(16) Plaintiffs' Reply Brief.

(17) Plaintiffs' Exhibit No. 1—Affidavit of E. B. Padrick (Tariffs).

(18) Plaintiffs' Exhibit No. 2—Affidavit of E. B. Padrick in respect to letters by him to Interstate Commerce Commission and Illinois Commerce Commission.

600 (19) Plaintiffs' Exhibit No. 3—certified copy of proposed ordinance of City of Chicago.

(20) Plaintiffs' Exhibit No. 4—certified copy of proceedings of Chicago City Council Committee on Local Transportation.

(21) Plaintiffs' Exhibit No. 5—certified copy of Minutes of Committee on Local Transportation of July 21, 1955.

(22) Plaintiffs' Exhibit No. 6—certified copy of minutes of Committee on Local Transportation of July 26, 1955.

(23) Plaintiffs' Exhibit No. 7—Affidavit of Edwin A. Wahlen.

(24) Memorandum Entered by the Court on December 12, 1955.

(25) Notice and proposed judgment order presented to the Court on December 15, 1955, by Counsel for Defendants City of Chicago, et al.

(26) Order entered on December 15, 1955, Granting Leave to File Objections to Proposed Judgment Order, and Continuing Hearing to January 16, 1956.

(27) Notice served by Counsel for Defendants City of Chicago, et al., on December 20, 1955, of their proposal to withdraw the draft order presented on December 15, 1955, and substitute the judgment order attached to such notice.

(28) Plaintiffs' exceptions to defendants' proposed order of summary declaratory judgment.

(29) Conclusions of law to be substituted in the "Order of Summary Declaratory Judgment" submitted by the City of Chicago, served by Parmelee Transportation Company on January 5, 1956.

(30) Plaintiffs' exceptions to Intervenor's Suggested proposed order of summary declaratory judgment, with plaintiffs' Exhibits 8 and 9 attached.

601 (31) Supplemental memorandum entered by the Court on January 12, 1956.

(32) Findings of Fact and Conclusions of Law entered by the Court on January 12, 1956.

(33) Judgment order entered by the Court on January 12, 1956.

(34) Notice of Appeal, filed January 13, 1956.

(35) Motion for injunction during pendency of appeal.

(36) Order for injunction during pendency of appeal, entered January 13, 1956.

(37) Supersedeas bond for injunction during pendency of appeal.

(38) The Court Reporter's transcript of proceedings on October 24 and 28, and on November 10 and 17, and on December 15, 1955, and on January 13, 1956; and any other transcripts of hearings not specified herein.

(39) All orders and memoranda entered by the Court not described above.

(40) This designation of the record on appeal.

Benjamin F. Goldstein,
209 South La Salle Street,
Chicago 4, Illinois,
CE ntral 6-7577,

Amos M. Mathews,
Rm. 280 Union Station Bldg.,
Chicago 6, Illinois,
RA ndolph 6-6900,

Albert J. Meserow,
231 South La Salle Street,
Chicago 4, Illinois,
ST ate 2-8500,

*Attorneys for Plaintiffs-
Appellants.*

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Certificate of Service.

I hereby certify that on January 19, 1956, I served the foregoing designation of contents of record on appeal upon the following named counsel for all of the appellees by mailing copies thereof to them by first class United States mail postage prepaid at Chicago, Illinois:

To: Joseph F. Grossman,
Special Assistant Corporation Counsel,
City of Chicago,
City Hall, Chicago, Illinois,
Attorney for Defendants-Appellees.

Lee A. Freeman,
105 S. La Salle Street,
Chicago, Illinois,
Attorney for Defendant-Intervenor-
Appellee.

Amos M. Mathews,
280 Union Station Building,
Chicago 6, Illinois,
Attorney for Plaintiffs-
Appellants.

609 United States of America, }
Northern District of Illinois. } ss.

I, Roy H. Johnson, Clerk of the United States District Court for the Northern District of Illinois, do hereby certify the above and foregoing to be a true and complete transcript of the proceedings had of record made in accordance with the Designation of Contents of Record on Appeal filed in this Court in the cause entitled: The Atchison, Topeka and Santa Fe Railway Company, et al., Plaintiffs vs. City of Chicago, a Municipal corporation, et al., Defendants, No. 55 C 1883, as the same appear from the original records and files thereof now remaining among the records of the said Court in my office.

In Testimony Whereof, I have hereunto subscribed my name and affixed the seal of the aforesaid Court at Chicago, Illinois, this 20th day of February, 1956.

(Seal) /s/ Roy H. Johnson, Clerk,
By Beverly V. Peters, Deputy Clerk.

(p. 170 is blank)

[fol. 171] IN UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

§§28-1

EXHIBIT B

CHAPTER 28

PUBLIC PASSENGER VEHICLES

- | | |
|--|--|
| 28- 1. Definitions | 28-18. Notice |
| 28- 2. License required | 28-19. Livery vehicles |
| 28- 3. Interurban operations | 28-19.1. Taximeter prohibited |
| 28- 4. Inspections | 28-19.2. Solicitation of passengers prohibited |
| 28- 4.1. Specifications | 28-20. Livery advertising |
| 28- 5. Application | 28-21. Sightseeing vehicles |
| 28- 6. Investigation and issuance of license | 28-22. Taxicabs |
| 28- 7. License fees | 28-22.1. Public convenience and necessity |
| 28- 8. Renewal of licenses | 28-23. Identification of taxicab and cabman |
| 28- 9. Personal license—fair employment practice | 28-24. Taximeters |
| 28-10. Emblem | 28-25. Taximeter inspection |
| 28-11. License card | 28-26. Tampering with meters |
| 28-12. Insurance | 28-27. Taximeter inspection fee |
| 28-13. Payment of judgments and awards | 28-28. Taxicab service |
| 28-14. Suspension of license | 28-29. Group riding |
| 28-15. Revocation of license | 28-29.1. Front seat passenger |
| 28-16. Interference with commissioner's duties | 28-30. Taxicab fares |
| 28-17. Front seat passenger | 28-31. Terminal vehicle |
| | 28-32. Penalty |

Definitions

28-1. As used in this chapter:

"Busman" means a person engaged in business as proprietor of one or more sightseeing buses.

"Cabman" means a person engaged in business as proprietor of one or more taxicabs or livery vehicles.

"Chauffeur" means the driver of a public passenger vehicle licensed by the city of Chicago as a public chauffeur.

"City" means the city of Chicago.

* For amendments to former Chapter 28 prior to its revision on 12-20-51, see footnote at end of this chapter.

"Coachman" means a person engaged in business as proprietor of one or more terminal vehicles.

"Commissioner" means the public vehicle license commissioner, or any other body or officer having supervision of public passenger vehicle operations in the city.

"Council" means the city council of the city of Chicago.

"Livery vehicle" means a public passenger vehicle for hire only at a charge or fare for each passenger per trip or for each vehicle per trip fixed by agreement in advance.

"Person" means a natural person, firm or corporation in his own capacity and not in a representative capacity, the personal pronoun being applicable to all such persons of any number or gender.

"Public passenger vehicle" means a motor vehicle, as defined in the Motor Vehicle Law of the State of Illinois, which is used for the transportation of passengers for hire, excepting those devoted exclusively for funeral use or in operation of a metropolitan transit authority or public utility under the laws of Illinois.

"Sightseeing vehicle" means a public passenger vehicle for hire principally on sightseeing tours at a charge or fare per passenger for each tour fixed by agreement in advance or for hire otherwise at a charge for each vehicle per trip fixed by agreement in advance.

"Taxicab" means a public passenger vehicle for hire only at lawful rates of fare recorded and indicated by taximeter in operation when the vehicle is in use for transportation of any passenger.

"Taximeter" means any mechanical device which records and indicates a charge or fare measured by distance traveled, waiting time and extra passengers.

[fol. 172]

PUBLIC PASSENGER VEHICLES

§§ 28-2 to 28-6

"Terminal vehicle" means a public passenger vehicle which is operated under contracts with railroad and steamship companies, exclusively for the transfer of passengers from terminal stations. [Passed. Coun. J. 12-20-51, p. 1596; amend. 1-30-52, p. 1921; 12-30-52, p. 3905.]

License required

28-2. It is unlawful for any person other than a metropolitan transit authority or public utility to operate any vehicle, or for any such person who is the owner of any vehicle to permit it to be operated, on any public way for the transportation of passengers for hire from place to place within the corporate limits of the city, except on a funeral trip, unless it is licensed by the city as a public passenger vehicle.

It is unlawful for any person to hold himself out to the public by advertisement or otherwise as a busman, cabman or coachman or as one who provides or furnishes any kind of public passenger vehicle service unless he has one or more public passenger vehicles licensed for the class of service offered; provided that any association or corporation which furnishes call service for transportation may advertise the class of service which may be rendered to its members or subscribers, as provided in this chapter, if it assumes the liability and furnishes the insurance as required by section 28-23. [Passed. Coun. J. 12-20-51, p. 1596; amend. 1-30-52, p. 1921; 12-30-52, p. 3905.]

Interurban operations

28-3. Nothing in this chapter shall be construed to prohibit any public passenger vehicle from coming into the city to discharge passengers accepted for transportation outside the city. While such vehicle is in the city no person shall solicit passengers therefor and no roof light or other special light shall be used to indicate that the vehicle is vacant or subject to hire. A white card bearing the words "Not For Hire" printed in black letters not less than two inches in height shall be displayed on the windshield of the vehicle. Any person in control or possession of such vehicle who violates the provisions of this section shall be subject to arrest and fine of not less than fifty dollars nor more than two hundred dollars for each offense. [Passed. Coun. J. 12-20-51, p. 1596; amend. 1-30-52, p. 1921.]

Inspections

28-4. No vehicle shall be licensed as a public passenger vehicle until it has been inspected under the direction of

the commissioner and found to be in safe operating condition and to have adequate body and seating facilities which are clean and in good repair for the comfort and convenience of passengers. [Passed. Coun. J. 12-20-51, p. 1596; amend. 12-30-52, p. 3905.]

Specifications

28-4.1. No vehicle shall be licensed as a livery vehicle or taxicab unless it has two doors on each side, and no vehicle having seating capacity for more than seven passengers shall be licensed as a public passenger vehicle unless it has at least three doors on each side or fixed aisle space for passage to doors. [Passed. Coun. J. 12-30-52, p. 3905.]

Application

28-5. Application for public passenger vehicle licenses shall be made in writing signed and sworn to by the applicant upon forms provided by the commissioner. The application shall contain the full name and Chicago street address of the applicant, the manufacturer's name, model, length of time in use, horse power and seating capacity of the vehicle applicant will use if a license is issued, and the class of public passenger vehicle license requested. The commissioner shall cause each application to be stamped with the time and date of its receipt. The applicant shall submit a statement of his assets and liabilities with his application. [Passed. Coun. J. 12-20-51, p. 1596; amend. 1-30-52, p. 1921.]

Investigation and issuance of license

28-6. Upon receipt of an application for a public passenger vehicle license the commissioner shall cause an investigation to be made of the character and reputation of the applicant as a law abiding citizen; the financial ability of the applicant to render safe and comfortable transportation service, to maintain or replace the equipment for such service and to pay all judgments and awards which may be

rendered for any cause arising out of the operation of a public passenger vehicle during the license period. If the commissioner shall find that the applicant is qualified and that the vehicle for which a license is applied for is in safe and proper condition as provided in this chapter, the com-

[fol. 173]

§§ 28-7 to 28-10

MUNICIPAL CODE OF CHICAGO

missioner shall issue a public passenger vehicle license to the owner of the vehicle for the license period ending on the thirty-first day of December following the date of its issuance, subject to payment of the public passenger vehicle license fee for the current year. [Passed. Coun. J. 12-20-51, p. 1596; amend. 4-16-52, p. 2178.]

License fees

28-7. The annual fee for each public passenger vehicle license of the class herein set forth is as follows:

Livery vehicle	\$ 25.00
Sightseeing vehicle	125.00
Taxicab	40.00
Terminal vehicle	25.00

Said fee shall be paid in advance when the license is issued and shall be applied to the cost of issuing such license, including, without being limited to, the investigations, inspections and supervision necessary therefor, and to the cost of regulating all operations of public passenger vehicles as provided in this chapter.

Nothing in this section shall affect the right of the city to impose or collect a vehicle tax and any occupational tax, as authorized by the laws of the state of Illinois, in addition to the license fee herein provided. [Passed. Coun. J. 12-20-51, p. 1596; amend. 12-30-52, p. 3905.]

Renewal of licenses

28-8. All licenses for public passenger vehicles issued for the year 1951, which have not been revoked or surrendered prior to the time when such licenses for the year 1952 shall have been issued, may be renewed from year to year,

subject to the provisions of this chapter. [Passed. Coun. J. 12-20-51, p. 1596; amend. 1-30-52, p. 1921.]

*Personal license—fair
employment practice*

28-9: No public passenger vehicle license shall be subject to voluntary assignment or transfer by operation of law, except in the event of the licensee's induction or recall into the armed forces of the United States for active duty or in the event of the licensee's death. In case of death the assignment shall be made by the legal representatives of his estate. No assignment shall be effective until the assignee shall have filed application for a license and is found to be qualified as provided in sections 28-5 and 28-6. If qualified the license shall be transferred to him by the commissioner, subject to payment of a transfer fee of \$50.00, the assumption by the assignee of all liabilities for loss or damage resulting from any occurrence arising out of or caused by the operation or use of the licensed public passenger vehicle before the effective date of the transfer and the approval by the commissioner of the insurance to be furnished by the busman, cabman or coachman as required by section 28-12.

It is unlawful for any busman, cabman or coachman to lease or loan a licensed public passenger vehicle for operation by any person for transportation of passengers for hire within the city. No person other than a chauffeur, who is either the busman, cabman or coachman or one hired by the busman, cabman or coachman to drive such vehicle as his agent or employee, in the manner prescribed by the busman, cabman or coachman, shall operate such vehicle for the transportation of passengers for hire within the city.

There shall be no discrimination by any busman, cabman or coachman against any person employed or seeking employment as a chauffeur with respect to hire, promotion, tenure, terms, conditions and privileges of employment on account of race, color, religion, national origin or ancestry. [Passed. Coun. J. 12-20-51, p. 1596; amend. 1-30-52, p. 1921; 12-30-52, p. 3905.]

Emblem

28-10. The commissioner shall deliver with each license a sticker license emblem which shall bear the words "Public Vehicle License" and "Chicago" and the numerals designating the year for which such license is issued, a reproduction of the corporate seal of the city, the names of the mayor and the commissioner and serial number identical with the number of the public vehicle license. The predominant back-ground colors of such sticker license emblems shall be different from the vehicle tax emblem for the same year and shall be changed annually. The busman, cabman or coachman shall affix, or cause to be affixed, said sticker emblem on the inside of the glass part of the windshield of said vehicle: [Passed. Coun. J. 12-20-51, p. 1596; amend. 12-30-52, p. 3905.]

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PUBLIC PASSENGER VEHICLES

§§ 28-11 to 28-13

License card

28-11. In addition to the license and sticker emblem the commissioner shall deliver a license card for each vehicle. Said card shall contain the name of the busman, cabman or coachman, the license number of the vehicle and the date of inspection thereof. It shall be signed by the commissioner and shall contain blank spaces upon which entries of the date of every inspection of the vehicle and such other entries as may be required shall be made. It shall be of different color each year. A suitable frame with glass cover shall be provided and affixed on the inside of the vehicle in a conspicuous place and in such manner as may be determined by the commissioner for insertion and removal of the public passenger vehicle license card; and in every livery vehicle and taxicab said frame shall also be provided for insertion and removal of the chauffeur's license card and such other notice as may be required by the provisions of this chapter and the rules of the commissioner. It is unlawful to carry any passenger or his baggage unless the license cards are exposed in the frame as provided in this section. [Passed. Coun. J. 12-20-51, p. 1596; amend. 12-30-52, p. 3905.]

Insurance

28-12. Every busman, cabman or coachman shall carry public liability and property damage insurance and workmen's compensation insurance for his employees with solvent and responsible insurers approved by the commissioner, authorized to transact such insurance business in the state of Illinois, and qualified to assume the risk for the amounts hereinafter set forth under the laws of Illinois, to secure payment of any loss or damage resulting from any occurrence arising out of or caused by the operation or use of any of the busman's, cabman's or coachman's public passenger vehicles.

The public liability insurance policy or contract may cover one or more public passenger vehicles, but each vehicle shall be insured for the sum of at least five thousand dollars for property damage and fifty thousand dollars for injuries to or death of any one person and each vehicle having seating capacity for not more than seven adult passengers shall be insured for the sum of at least one hundred thousand dollars for injuries to or death of more than one person in any one accident. Each vehicle having seating capacity for more than seven adult passengers shall be insured for injuries to or death of more than one person in any one accident for at least five thousand dollars more for each such additional passenger capacity. Every insurance policy or contract for such insurance shall provide for the payment and satisfaction of any final judgment rendered against the busman, cabman or coachman and person insured, or any person driving any insured vehicle, and that suit may be brought in any court of competent jurisdiction upon such policy or contract by any person having claims arising from the operation or use of such vehicle. It shall contain a description of each public passenger vehicle insured, manufacturer's name and number, the state license number and the public passenger vehicle license number.

In lieu of an insurance policy or contract a surety bond or bonds with a corporate surety or sureties authorized to do business under the laws of Illinois, may be accepted by the commissioner for all or any part of such insurance; provided that each bond shall be conditioned for the pay-

ment and satisfaction of any final judgment in conformity with the provisions of an insurance policy required by this section.

All insurance policies or contracts or surety bonds required by this section, or copies thereof certified by the insurers or sureties, shall be filed with the commissioner and no insurance or bond shall be subject to cancellation except on thirty days' previous notice to the commissioner. If any insurance or bond is cancelled or permitted to lapse for any reason, the commissioner shall suspend the license for the vehicle affected for a period not to exceed thirty days, to permit other insurance or bond to be supplied in compliance with the provisions of this section. If such other insurance or bond is not supplied, within the period of suspension of the license, the mayor shall revoke the license for such vehicle. [Passed, Coun. J. 12-20-51, 1596; amend. 1-30-52, p. 1921; 12-30-52, p. 3905.]

Payment of judgments and awards

28-13. All judgments and awards rendered by any court or commission of competent jurisdiction for loss or damage in the operation or use of any public passenger vehicle shall be paid by the busman, cabman or coachman within ninety days after they shall become final and not stayed

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§§ 28-14 to 28-19 . . . MUNICIPAL CODE OF CHICAGO

by supersedeas. This obligation is absolute and not contingent upon the collection of any indemnity from insurance. [Passed, Coun. J. 12-20-51, p. 1596; amend. 12-30-52, p. 3905.]

Suspension of license

28-14. If any public passenger vehicle shall become unsafe for operation or if its body or seating facilities shall be so damaged, deteriorated or unclean as to render said vehicle unfit for public use, the license therefor shall be suspended by the commissioner until the vehicle shall be made safe for operation and its body shall be repaired and

painted and its seating facilities shall be reconditioned or replaced as directed by the commissioner. In determining whether any public passenger vehicle is unfit for public use the commissioner shall give consideration to its effect on the health, comfort and convenience of passengers and its public appearance on the streets of the city.

Upon suspension of a license for any cause, under the provisions of this chapter, the license sticker emblem shall be removed by the commissioner from the windshield of the vehicle and an entry of the suspension shall be made on the license card. If the suspension is terminated an entry thereof shall be made on the license card by the commissioner and a duplicate license sticker shall be furnished by the commissioner for a fee of one dollar. The commissioner shall notify the department of police of every suspension and termination of suspension. [Passed, Coun. J. 12-20-51, p. 1596.]

Revocation of license

28-15. If any summons or subpoena issued by a court or commission cannot be served upon the busman, cabman, or coachman at his last Chicago address recorded in the office of the commissioner within sixty days after such process is delivered to the person authorized to serve it, and the busman, cabman, or coachman fails to appear in answer to such process for want of service, or if any busman, cabman or coachman shall refuse or fail to pay any judgment or award as provided in section 28-13, or shall lease or loan any of his licensed public passenger vehicles for operation by any person for hire or shall be convicted of a felony or any criminal offense involving moral turpitude, the mayor shall revoke all public vehicle licenses held by him.

If any public passenger vehicle license was obtained by application in which any material fact was omitted or stated falsely, or if any public passenger vehicle is operated in violation of the provisions of this chapter for which revocation of the license is not mandatory, or if any public passenger vehicle is operated in violation of the rules and regulations of the commissioner relating to the ad-

ministration and enforcement of the provisions of this chapter, the commissioner may recommend to the mayor that the public passenger vehicle license therefor be revoked and the mayor, in his discretion, may revoke said license.

Upon revocation of any license, the commissioner shall remove the license sticker emblem and the license card from the vehicle affected. [Passed. Coun. J. 12-20-51, p. 1596; amend. 1-30-52, p. 1921; 12-30-52, p. 3905.]

Interference with commissioner's duties

28-16. Every busman, cabman or coachman shall deliver or submit his public passenger vehicles for inspection or the performance of any other duty by the commissioner upon demand. It is unlawful for any person to interfere with or hinder or prevent the commissioner from discharging any duty in the enforcement of this chapter. [Passed. Coun. J. 12-20-51, p. 1596; amend. 12-30-52, p. 3905.]

Front seat passenger

28-17. It is unlawful to permit more than one passenger to occupy the front seat with the chauffeur in any public passenger vehicle. [Passed. Coun. J. 12-20-51, p. 1596.]

Notice

28-18. It is the duty of every busman, cabman or coachman to notify the commissioner whenever any change in his Chicago address is made. Any notice required to be given to the busman, cabman or coachman shall be sufficient if addressed to the last Chicago address recorded in the office of the commissioner. [Passed. Coun. J. 12-20-51, p. 1596; amend. 12-30-52, p. 3905.]

Livery vehicles

28-19. No person shall be qualified for a livery vehicle license and a taxicab license at the same time; nor shall any person having a livery vehicle license be associated with anyone for sending or receiving calls for taxicab service.

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PUBLIC PASSENGER VEHICLES §§ 28-19.1 to 28-22.1

No license for any livery vehicle shall be issued except in the annual renewal of such license or upon transfer to permit replacement of a vehicle for that licensed unless, after a public hearing, the commissioner shall determine that public convenience and necessity require additional livery service and shall recommend to the council the maximum number of such licenses to be authorized by ordinance.

Not more than six passengers shall be accepted for transportation in a livery vehicle on any trip. [Passed. Coun. J. 12-20-51, p. 1596; amend. 1-30-52, p. 1921.]

Taximeter prohibited

28-19.1. It is unlawful for any person to operate or drive a livery vehicle equipped with a meter which registers a charge or fare or indicates the distance traveled by which the charge or fare to be paid by a passenger is measured. [Passed. Coun. J. 1-30-52, p. 1921.]

Solicitation of passengers prohibited

28-19.2. It is unlawful for any person to solicit passengers for transportation in a livery vehicle on any public way. No such vehicle shall be parked on any public way for a time longer than is reasonably necessary to accept passengers in answer to a call for service and no passengers shall be accepted for any trip in such vehicle without previous engagement for such trip, at a fixed charge or fare, through the station or office from which said vehicle is operated. [Passed. Coun. J. 1-30-52, p. 1921.]

Livery advertising

28-20. It is unlawful for the cabman of any livery vehicle, or the station from which it is operated to use the word "taxi", "taxicab" or "cab" in connection with or as part of the name of the cabman or his trade name.

The outside of the body of each livery vehicle shall be uniform black, blue or blue-black color. No light fixtures or lights shall be attached to or exposed so as to be visible

outside of any livery vehicle, except such as are required by the law of the state of Illinois regulating traffic by motor vehicles and one rear red light in addition to those required by said law. No name, number or advertisement of any kind, excepting official license emblems or plates, shall be painted or carried so as to be visible outside of any livery vehicle.

It is unlawful for any person to hold himself out to the public by advertisement, or otherwise, to render any livery service unless he is the cabman of a licensed livery vehicle. [Passed. Coun. J. 12-20-51, p. 1596.]

Sightseeing vehicles

28-21. Sightseeing vehicles shall not be used for transportation of passengers for hire except on sightseeing tours or chartered trips. Passengers for sightseeing tours shall not be solicited upon any public way except at bus stands specially designated by the council for sightseeing vehicles.

It is unlawful for any cabman or coachman to advertise his public passenger vehicle for hire on sightseeing tours. [Passed. Coun. J. 12-20-51, p. 1596; amend. 12-30-52, p. 3905.]

Taxicabs

28-22. Every taxicab shall be operated regularly to the extent reasonably necessary to meet the public demand for service. If the service of any taxicab is discontinued for any reason except on account of strike, act of God or cause beyond the control of the cabman, the commissioner may give written notice to the cabman to restore the taxicab to service, and if it is not restored within five days after notice, the commissioner may recommend to the mayor that the taxicab license be revoked and the mayor, in his discretion, may revoke same. [Passed. Coun. J. 12-20-51, p. 1596.]

Public convenience and necessity

28-22.1. Not more than 3761 taxicab licenses shall be issued unless, after a public hearing, the commissioner shall report to the council that public convenience and necessity require additional taxicab service and shall recommend

the number of taxicab licenses which may be issued. Notice of such hearing stating the time and place thereof shall be published in the official newspaper of the city at least twenty days prior to the hearing and by mailing a copy thereof to all taxicab licensees. At such hearing any licensee, in person or by attorney, shall have the right to cross-examine witnesses and to introduce evidence pertinent to the subject. At any time and place fixed for such hearing it may be adjourned to another time and place without further notice.

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§§ 28-23 to 28-25

MUNICIPAL CODE OF CHICAGO

In determining whether public convenience and necessity require additional taxicab service, due consideration shall be given to the following:

1. The public demand for taxicab service;
2. The effect of an increase in the number of taxicabs on the safety of existing vehicular and pedestrian traffic;
3. The effect of increased competition,
 - (a) on revenues of taxicab licensees;
 - (b) on cost of rendering taxicab service, including provisions for proper reserves and a fair return on investment in property devoted to such service;
 - (c) on the wages or compensation, hours and conditions of service of taxicab chauffeurs;
4. The effect of a reduction, if any, in the level of net revenues to taxicab licensees on reasonable rates of fare for taxicab service;
5. Any other facts which the commissioner may deem relevant.

If the commissioner shall report that public convenience and necessity require additional taxicab service, the council, by ordinance, may fix the maximum number of taxicab licenses to be issued, not to exceed the number recom-

mended by the commissioner. [Passed. Coun. J. 1-30-52, p. 1921.]

Identification of taxicab and cabman

28-23. Every taxicab shall have the cabman's name, telephone number and the public passenger vehicle license number plainly painted in plain Gothic letters and figures of three-eighth inch stroke and at least two inches in height in the center of the main panel of the rear doors of said vehicle. In lieu of the cabman's telephone number the name and telephone number of any corporation or association with which the cabman is affiliated may be painted in the same manner, provided such corporation or association shall have assumed equal liability with the cabman for any loss or damage resulting from any occurrence arising out of or caused by the operation or use of any of the cabman's taxicabs and shall carry and furnish to the commissioner public liability and property damage insurance to secure payment of such loss or damage as provided in section 28-12. The public vehicle license number assigned to any taxicab shall be assigned to the same vehicle or to any vehicle substituted therefor upon annual renewal of the license. No other name, number or advertisement of any kind, excepting signs required by this chapter, official license emblems or plates and a trade emblem, in a manner approved by the commissioner, shall be painted or carried so as to be visible on the outside of any taxicab. [Passed. Coun. J. 12-20-51, p. 1596; amend. 1-30-52, p. 1921.]

Taximeters

28-24. Every taxicab shall be equipped with a taximeter connected with and operated from the transmission of the taxicab to which it is attached. The taximeter shall be equipped with a flag at least three inches by two inches in size. The flag shall be plainly visible from the street and shall be kept up when the taxicab is for hire and shall be kept down when it is engaged.

Taximeters shall have a dial or dials to register the tariff in accordance with the lawful rates and charges. The dial shall be in plain view of the passenger while riding and

between sunset and sunrise the dial shall be lighted to enable the passenger to read it.

It is unlawful to operate a taxicab for hire within the city unless the taximeter attached thereto has been sealed by the commissioner. [Passed. Coun. J. 12-20-51, p. 1596; amend. 1-30-52, 1921.]

Taximeter inspection.

28-25. At the time a taxicab license is issued and semi-annually thereafter the taximeter shall be inspected and tested by the commissioner to determine if it complies with the specifications of this chapter and accurately registers the lawful rates and charges. If it is in proper condition for use, the taximeter shall be sealed and a written certificate of inspection shall be issued by the commissioner to the cabman. Upon complaint by any person that a taximeter is out of working order or does not accurately register the lawful rates and charges it shall be again inspected and tested and, if found to be in improper working condition or inaccurate, it shall be unlawful to operate the taxicab to which it is attached until it is equipped with a taximeter which has been inspected and tested by the commissioner, found to be in proper condition, sealed and a written certificate of inspection therefor is issued.

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PUBLIC PASSENGER VEHICLES

§§ 28-26 to 28-30

The cabman or person in control or possession of any taxicab shall deliver it with the taximeter attached or deliver the taximeter detached from the taxicab for inspection and test as requested by the commissioner. The cabman may be present or represented when such inspection and test is made. [Passed. Coun. J. 12-20-51, p. 1596.]

Tampering with meters.

28-26. It is unlawful for any person to tamper with, mutilate or break any taximeter or the seal thereof or to transfer a taximeter from one taxicab to another for use in transportation of passengers for hire before delivery of the taxicab with a transferred taximeter for inspection test

and certification by the commissioner as provided in section 28-25. [Passed. Coun. J. 12-20-51, p. 1596.]

Taximeter inspection fee

28-27. The fee for each certificate of inspection shall be three dollars, but no charge shall be made for any certificate when the inspection and test is made upon complaint, and it is found that the taximeter is in proper working condition and accurately registers the lawful rates and charges. [Passed. Coun. J. 12-20-51, p. 1596.]

Taxicab service

28-28. It is unlawful to refuse any person transportation to any place within the city in any taxicab which is unoccupied by a passenger for hire unless it is on its way to pick up a passenger in answer to a call for service or it is out of service for any other reason. When any taxicab is answering a call for service or is otherwise out of service it shall not be parked at a cabstand, and no roof light or other special light shall be used to indicate that the vehicle is vacant or subject to hire. A white card bearing the words "Not For Hire" printed in black letters not less than two inches in height shall be displayed on the windshield of such taxicab. [Passed. Coun. J. 12-20-51, p. 1596.]

Group riding

28-29. Group riding is prohibited in taxicabs, except as directed by the passenger first engaging the taxicab. Not more than five passengers shall be accepted for transportation on any trip; provided that additional passengers under twelve years of age accompanied by an adult passenger shall be accepted if the taxicab has seating capacity for them. [Passed. Coun. J. 12-20-51, p. 1596.]

Front seat passenger

28-29.1. No passenger shall be permitted to ride on the front seat with the chauffeur of the taxicab unless all other seats are occupied. [Passed. Coun. J. 12-20-51, p. 1596.]

Taxicab fares.

28-30. Rates of fare for taxicabs shall be as follows:

For the first one-quarter of a mile or fraction thereof for one person	25 cents
For each additional one-half of a mile or fraction thereof for one person	10 cents
For each additional person of twelve years or more for the whole trip	10 cents
For each three minutes of waiting, time or fraction thereof	10 cents

Waiting time shall include the time beginning three minutes after call time at the place to which the taxicab has been called when it is not in motion, the time consumed by unavoidable delays at street intersections, bridges or elsewhere and the time consumed while standing at the direction of a passenger.

Every passenger under twelve years of age when accompanied by an adult shall be carried without charge.

Ordinary hand baggage of passengers shall be carried without charge. A fee of twenty-five cents may be charged for carrying a trunk, but no trunk shall be carried except inside of the taxicab.

Immediately on arrival at the passenger's destination it shall be the duty of the chauffeur to throw the taximeter lever to the non-recording position and to call the passenger's attention to the fare registered.

It is unlawful for any person to demand or collect any fare for taxicab service, which is more or less than the rates established by the foregoing schedule, or for any passenger to refuse payment of the fare so registered. [Passed. Coun. J. 12-20-51, p. 1596; amend. 1-30-52, p. 1921.]

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§§ 28-31 to 28-32

MUNICIPAL CODE OF CHICAGO

Terminal vehicle

28-31. No person shall be qualified for a terminal vehicle license unless he has a contract with one or more railroad

or steamship companies for the transportation of their passengers from terminal stations.

It is unlawful to operate a terminal vehicle for the transportation of passengers for hire except for their transfer from terminal stations to destinations in the area bounded on the north by E. and W. Ohio street; on the west by N. and S. Desplaines street; on the south by E. and W. Roosevelt road; and on the east by Lake Michigan. [Passed. Coun. J. 12-20-51, p. 1596; amend. 1-30-52, p. 1921; 12-30-52, p. 3905.]

Penalty

28-32. Any person violating any provision of this chapter for which a penalty is not otherwise provided shall be fined not less than \$5.00 nor more than \$100.00 for the first offense, not less than \$25.00 nor more than \$100.00 for the second offense during the same calendar year, and not less than \$50.00 nor more than \$100.00 for the third and succeeding offenses during the same calendar year, and each day that such violation shall continue shall be deemed a separate and distinct offense. [Passed. Coun. J. 12-20-51, p. 1596.]

NOTE: The following list covers amendments prior to 12-20-51 to former sections 28-1 to 28-22, revised 12-28-45, p. 4689:

- 28-4. 2-6-48, p. 1918; 3-1-48, p. 1983.
 - 28-8. 2-28-46, p. 5167; 2-5-47, p. 7249; 2-6-48, p. 1918.
 - 28-18. 2-28-46, p. 5167; 2-5-47, p. 7249; 2-6-48, p. 1918.
 - 28-19. 2-6-48, p. 1918; 3-1-48, p. 1983; 12-29-50, p. 7622.
 - 28-29. 9-29-48, p. 2978.
 - 28-35. 8-21-41, p. 5457; 10-27-43, p. 803; 12-28-44, p. 2626.
 - 28-36. 10-27-43, p. 803.
 - 28-38. 8-21-41, p. 5457.
-

[fol. 180] Clerk's Certificate to foregoing paper omitted in printing.

[fol. 181]

[File endorsement omitted]

IN UNITED STATES DISTRICT COURT, NORTHERN DISTRICT OF
ILLINOIS, EASTERN DIVISION

Civil Action #55 C 1883 — Equitable Relief Demanded

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY,
et al., Plaintiffs

v.

CITY OF CHICAGO, a Municipal Corporation, et al.,
Defendants

AFFIDAVIT—Filed November 10, 1955.

Charles E. Rheintgen, being first duly sworn on oath deposes and says that he is Vice President of the Parmelee Transportation Company and as such is authorized to execute this Affidavit on its behalf.

That the attached Local and Joint Passenger Tariff T No. 3 effective July 1, 1954 and Supplement No. 2 thereto effective October 1, 1955 are true and correct copies of charges, rules and regulations governing the transfer of passenger and baggage at junction points shown as issued by agents for the railroads covered thereunder.

Further affiant sayeth not.

Charles E. Rheintgen

Subscribed and sworn to before me this 10 day of November, 1955, Lilyan Fisher, Notary Public.

(SEAL)

[fol. 182]

I.C.C. No. 302

GTRy-C. T. C. No. W-1418

L&PSRy-C. T. C. No. 1059

NYCRR-C. T. C. No. 2664

(See Cancellation Notice, Page 2)

Ill. C. C. No. 76

I. R. C. No. 75

K. R. C. No. 58

M. P. S. C. No. 79

N. C. U. C. No. 44

P. S. C.-N. Y. No. 103

Ohio No. 91

(See Cancellation Notice, Page 2)

P. S. C.-Md. No. 71

P. U. C.-N. J. No. 78

Pa. P. U. C. No. 108

V. C. C. No. P-83

P. S. C.-W. Va. No. 88

(See Cancellation Notice, Page 2)

Only one supplement to this tariff
may be in effect at any time

TRUNK LINE—CENTRAL PASSENGER TARIFF BUREAU

LOCAL AND JOINT PASSENGER TARIFF

T NO. 3

(Cancelling Tariff T No. 2)

OF

CHARGES, RULES AND REGULATIONS

GOVERNING THE

TRANSFER OF PASSENGER AND BAGGAGE AT JUNCTION POINTS SHOWN HEREIN

FOR USE IN CONNECTION WITH

TARIFFS PUBLISHING ONE-WAY AND ROUND-TRIP FARES IN
WHICH SPECIFIC REFERENCE IS MADE AUTHORIZING THE USE
OF THIS TARIFF TO DETERMINE TRANSFER ARRANGEMENTS,
EXCEPT AS FURTHER PROVIDED IN SECTION 3

Issued May 26, 1954

Effective July 1, 1954

ISSUING AND INITIAL CARRIERS—See pages 2 and 3

Acting under Powers of At-
torney lawfully on file as indi-
cated on pages 2 and 3.

Issued by

V. ARMOLD, Agent,

One Park Ave., New York 16, N. Y.

[fol. 183]

SECTION 1.

SECTION 1

RULE 1. (a) ISSUING AND INITIAL CARRIERS.

This tariff is published by V. Arnold, Agent, for and on behalf of the following lines under Powers of Attorney as shown below and as filed with the Interstate Commerce Commission, and the several State Commissions indicated below.

ISSUING AND INITIAL CARRIERS

The Baltimore and Ohio Railroad Company

The Central Railroad Company of New Jersey

The Chesapeake and Ohio Railway Company

Chicago, Indianapolis and Louisville Railway Company

Delaware and Hudson Railroad Corporation

The Delaware, Lackawanna and Western Railroad Company

Erie Railroad Company

ØGrand Trunk Railway System

Lehigh Valley Railroad Company

Long Island Rail Road Company (Wm. Wyer, Trustee)

The New York Central Railroad Company

The New York, Chicago and St. Louis Railroad Company

Norfolk and Western Railway Company

The Pennsylvania Railroad Company

Pennsylvania-Reading Seashore Lines

The Pittsburgh and Lake Erie Railroad Company

Reading Company

Wabash Railroad Company

ØComprising the following carriers:

Canadian National Railway Company.

The Champlain and St. Lawrence Railroad Company (Canadian National Railway Company, Lessee).

The United States and Canada Rail Road Company (Canadian National Railway Company, Lessee).

Grand Trunk Western Railroad Company.

[fol. 184]

RULES AND REGULATIONS

RULE 3. APPLICATION OF TARIFF.

(a) This tariff is to be used only in connection with passenger tariffs authorizing fares for and on behalf of the issuing and initial carriers of this tariff, and in which specific reference is made hereto, except as provided in paragraph (c) below.

(b) The transfer arrangements published herein will apply from all stations authorized in paragraph (a) above, on the lines of the issuing and initial carriers in connection with tickets reading via or baggage checked via the junction points named herein.

Junction points are shown alphabetically in Section 2.

(c) Transfer charges to be used in constructing fares from points of origin, to destinations, or via routes not shown in tariffs authorizing through fares, are shown in Section 3. See Rule 5, Section 1.

(d) The letter designation shown after each railroad in Column 2, Section 2, indicates whether or not there are different stations at such junction points. Where the same letter designation is shown for two or more railroads at a junction point, it indicates that such lines use the same station and no transfer is necessary.

RULE 4. PASSENGER TRANSFERS.

Through Transportation

(a) Where it is designated in Column 4, Section 2, that passenger transfer is included, transfer coupon must be included in through ticket without additional collection.

(b) Where it is designated in Column 4, Section 2, that there are no arrangements for passenger transfer, transfer coupon must not be included in through ticket and passengers will be required to make their own arrangements.

Combination Transportation

(c) There are no arrangements for transfer of passengers holding "combination transportation" (combination of

tickets or passes, or of tickets and passes), and in such case passengers must make arrangements for their own personal transfer, except as provided in Section 2, at Chicago, Ill., Detroit, Mich., Kalamazoo, Mich., Louisville, Ky., and Toledo, Ohio, and other junction points shown in Section 3.

RULE 6. BAGGAGE TRANSFERS.

Through Transportation

(a) Where it is designated in Column 5, Section 2, that baggage transfer is included, baggage may be checked through without additional collection.

Note—Where it is designated in Column 5, Section 2, that baggage transfer is included, and charges are shown opposite such statement in Column 6, the charges shown in Column 6 will apply in connection with combination transportation only.

(b) Where it is designated in Column 5, Section 2, that baggage transfer is not included, and charges are shown opposite such statement in Column 6; baggage may be checked through such junction point by use of proper transfer tag upon collection of charges shown in Column 6.

(c) Where it is designated in Column 5, Section 2, that no transfer arrangements are available, baggage must be checked only to the junction point.

Combination Transportation

(d) There are no arrangements for the free checking of baggage on "combination transportation" (combination of tickets or passes, or of tickets and passes), and in such case baggage may be checked through by the use of proper transfer tag upon collection of the amount shown in Column 6, Section 2 (except where otherwise specifically indicated).

Note—The amounts shown in Column 6, Section 2 (except where otherwise specifically indicated), must always be collected where combination transportation is used.

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SECTION 2.

PASSENGER AND BAGGAGE TRANSFER ARRANGEMENTS
AT
JUNCTION POINTS NAMED BELOW

SECTION 3

Column 1	Column 2	Column 3	Column 4	Column 5	Column 6
JUNCTION POINT	Road and Designation	Transfer Required Between Depots	Passenger Transfer	Baggage Transfer	Baggage Transfer Charges (Per Piece) apply as provided in Rule 6, Section 1, except as otherwise indicated below
					Trunk: Hand Baggage
Chicago Ill. Central Station	IllCent. A NYC(†) A		Passenger transfer included	Transfer of all baggage included	
Dearborn Station	AT&SF B C&EI B CI&L B ErieRR B GT B Wab B		<p>Note 1—When combination transportation is presented, collection of \$1.20 must be made to cover transfer of passenger and all baggage, except as otherwise provided below.</p> <p>Exception (Applies Westbound or Eastbound) Transfer ticket (including transfer of passenger and all baggage) may be issued without charge to holders of combination transportation (not passes), as follows:</p> <p>(a) One way transfer—When passenger holds a ticket to Chicago, also a ticket from Chicago to destination to which the one way fare from Chicago is \$2.98 or more for first class ticket or \$2.12 or more for coach ticket.</p> <p>(b) Round trip transfer—When passenger holds a round trip ticket to Chicago from a point from which the one way fare to Chicago is \$2.98 or more for first class ticket or \$2.12 for coach ticket, and also holds a round trip ticket from Chicago to a destination to which the one way fare from Chicago is \$2.98 or more for first class ticket or \$2.12 or more for coach ticket.</p>		
Grand Central Station	B&O C CGW C SooLine C C&O(PMD) C	Between all railroad stations when transfer is necessary			
La Salle Street Station	CRI&P D NYC(†) D NickelPlate D				
Union Station	CB&Q E CMStP&P. E GM&O E PRR E				
Northwestern Station	C&NWSysm F				
CNS&M Station	CNS&M G				
CSS&SB Station	CSS&SB H				

†Chicago-Indianapolis and Chicago-Niles Lines.

*Chicago-Danville and Chicago-South Bend Lines. Also Trains Nos. 8 and 17 on Chicago-Niles Lines.

★Change effected by this supplement.

③Applies only when baggage is checked as provided for in Rules 5 and 6 (d), Section 1.

①Reissue: Effective October 1, 1954, in Supplement No. 1.

[fol. 186] Clerk's Certificate to foregoing paper omitted in printing.

[fol. 187] IN THE UNITED STATES COURT OF APPEALS FOR THE
SEVENTH CIRCUIT

No. 11692 SEPTEMBER TERM, 1956, SEPTEMBER SESSION, 1956.

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY
COMPANY, et al., Plaintiffs-Appellants,

v.

CITY OF CHICAGO, a municipal corporation, et al.,
Defendants-Appellees,

and

PARMELEE TRANSPORTATION COMPANY, Defendant-
Intervenor-Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

Before Major, Swain and Schnackenberg, Circuit
Judges.

OPINION—January 17, 1957

Schnackenberg, Circuit Judge. Twenty-one railroads,
herein sometimes referred to as Terminal Lines, and Rail-

The Atchison, Topeka and Santa Fe Railway Company; The Baltimore and Ohio Railroad Company; The Chesapeake and Ohio Railway Company; Chicago, Burlington & Quincy Railroad Company; Chicago & Eastern Illinois Railroad Company; Chicago Great Western Railway Company; Chicago, Indianapolis and Louisville Railway Company; Chicago, Milwaukee, St. Paul & Pacific Railroad Company; Chicago North Shore and Milwaukee Railway; Chicago and North Western Railway Company; Chicago, Rock Island & Pacific Railroad Company; Chicago South Shore and South Bend Railroad; Erie Railroad Company; Grand Trunk Western Railroad Company; Gulf, Mobile and Ohio Railroad Company; Illinois Central Railroad Company; Minneapolis, St. Paul & Sault Ste. Marie Railroad Company; The New York Central Railroad Company; The New York, Chicago and St. Louis Railroad Company; The Pennsylvania Railroad Company; and the Wabash Railroad Company.

road Transfer Service, Inc., sometimes herein referred to as Transfer, on October 24, 1955 brought an action in the [fol. 188] district court against defendant City of Chicago, sometimes herein referred to as the city, and certain officials thereof.² Plaintiffs' complaint seeks a declaratory judgment and injunctive relief against the enforcement against them of an ordinance known as chapter 23 of the municipal code of Chicago, as amended by an ordinance enacted July 26, 1955. Plaintiffs asked the district court to declare by its judgment, *inter alia*, that the ordinance, as amended in 1955, is void as applied to them.

Parmelee Transportation Company, sometimes herein referred to as Parmelee, on its petition was granted leave to intervene as a defendant.³

On motion of defendants, other than Parmelee, pursuant to rule 56 of the federal rules of civil procedure,⁴ and on the pleadings, affidavits and exhibits submitted by all parties, the district court on January 12, 1956 granted a summary judgment against plaintiffs and dismissed their action.⁵ 136 F. Supp. 476. From said judgment this appeal was taken.⁶

The undisputed facts we now set forth.

There are eight passenger terminals in downtown Chicago, each being used by from one to six railroads. No one railroad passes through Chicago, but about 3900 railroad passengers daily travel through Chicago on continuous journeys which begin and end at points outside Chicago. At Chicago, they transfer from an incoming, to an outgoing, railroad. The only practical method of transferring

² Richard J. Daley, as mayor; John C. Melaniphy, as acting corporation counsel; Timothy P. O'Connor, as commissioner of police; and William P. Flynn, as public license commissioner.

³ The district court considered the petition as an answer to the complaint.

⁴ Fed. Rules of Civil Procedure, rule 56, 28 U.S.C.A.

⁵ On the same day the district court filed "findings of fact" and "conclusions of law", one conclusion being that there is no genuine issue of fact involved in this controversy.

⁶ On January 13, 1956 the district court ordered that defendants, other than Parmelee, be enjoined from enforcing the ordinance in question against plaintiffs upon the latter filing supersedeas bond of \$50,000. It is our understanding that this bond was filed.

these passengers between the different terminal stations is by motor vehicle equipped to carry them and their hand baggage simultaneously. More than 99 per cent of the passengers so transferred between terminal stations are [fol. 189] traveling on through tickets between points of origin and destination located in different states. They are carried over public ways of the city.

Transfer began its operations on October 1, 1955, but has not applied to the city for public passenger terminal vehicle licenses. These transfer operations are required by a tariff filed with the Interstate Commerce Commission.⁷ They have been provided for by tariffs for more than the past forty years.

Pursuant to such tariffs a passenger traveling through Chicago purchases at his point of origin a railroad ticket composed of a series of coupons covering his complete transportation to his destination. If his through journey requires him to transfer from one railroad passenger terminal in Chicago to another, a part of his ticket consists of a coupon good for the transfer of himself and his hand baggage between such terminals. The expense of the required transfer service is absorbed by the railroads.

⁷ Local and Joint Passenger Tariff No. 3 governing, *inter alia*, passengers and baggage transfer between stations in Chicago, was filed with the Interstate Commerce Commission on behalf of Terminal Lines. On page 11 of said tariff, in Section 2 thereof, the Terminal Lines are listed according to the Chicago stations which they enter and it is set forth in Section 2 thereof that transfer is required between all railroad stations when transfer is necessary, and in Column 4 appears "Passenger transfer included", while in Column 5 there appears "Transfer of all baggage included".

Page 5 of said tariff in Section 1 thereof provides in rule 4, in part, as follows:

"Through Transportation. (a) Where it is designated in Column 4, Section 2, that passenger transfer is included, transfer coupon must be included in through ticket without additional collection."

And rule 6 in Section 1, in part, provides:

"Through Transportation. (a) Where it is designated in Column 5, Section 2, that baggage transfer is included, baggage may be checked through without additional collection."

The tariffs provide that any such required transfer service shall be without additional charge where a one-way fare from Chicago to destination would be more than a specified minimum sum. Where such fare would be less than such minimum, a fixed charge which varies with the fare must be added to cover the required transfer service.

Prior to October 1, 1955, there had existed for many years arrangements between the Terminal Lines and Parmelee whereby it furnished this service for coupon-holding passengers. On June 13, 1955, the Terminal Lines ended [fol. 190] their arrangement with Parmelee effective September 30, 1955. Under date of October 1, 1955, the Terminal Lines and Transfer executed a contract. In brief, this contract⁸ provides that, upon delivery of a transfer coupon to Transfer by a through-passenger, it will carry him and his hand baggage from the incoming to the appropriate outgoing station without charge. Transfer is compensated by the outgoing terminal railroad. Transfer is given the exclusive right to perform this transfer service. Transfer devotes its vehicles exclusively to service under the contract.⁹

On and prior to June 13, 1955, there was in effect an ordinance of the city, being said chapter 28 of the municipal code, consisting of sections 28-1 to 28-32,¹⁰ for the regulation of "Public Passenger Vehicles." Section 28-1 contained the following definitions, *inter alia*:

"'Public passenger vehicle' means a motor vehicle, as defined in the Motor Vehicle Law of the State of Illinois, which is used for the transportation of passengers for hire, excepting those devoted exclusively for funeral use or in operation of a metropolitan

⁸ On or about September 19, 1955, the railroads filed copies of the contract with the Interstate Commerce Commission and with the Illinois Commerce Commission.

⁹ The contract also provides that Transfer shall perform certain additional baggage transfer services for Terminal Lines. The transfer of a passenger's *checked* baggage by Transfer in vehicles other than "terminal vehicles", although covered by terms of the contract between Terminal Lines and Transfer, as well as actually performed by Parmelee prior to October 1, 1955, is not involved in this case.

¹⁰ Herein sometimes referred to as the prior ordinance.

transit authority or public utility under the laws of Illinois."

* * * * *

"Terminal vehicle' means a public passenger vehicle which is operated under contracts with railroad and steamship companies, exclusively for the transfer of passengers from terminal stations."

Section 28-31 provided:

"28-31. No person shall be qualified for a terminal vehicle license unless he has a contract with one or more railroad or steamship companies for the transportation of their passengers from terminal stations.

"It is unlawful to operate a terminal vehicle for the transportation of passengers for hire except for their transfer from terminal stations to destinations [fol. 191] in the area bounded on the north by E. and W. Ohio Street; on the west by N. and S. Desplaines Street; on the south by E. and W. Roosevelt Road; and on the east by Lake Michigan."

Certain other parts of chapter 28 incorporated regulations enacted pursuant to the police power of the city.¹¹

Parmelee was, on and prior to September 30, 1955, the only person having a transfer contract with the Terminal Lines and licensed to operate terminal vehicles under the ordinance.

At a meeting of the committee on local transportation of the Chicago city council held on July 21, 1955, the chairman stated that recently he had been advised by the Vehicle License Commissioner that he had received a communication from Parmelee advising that its contract with the

¹¹ These are provisions for granting and suspension of licenses, safety regulations based on the type of vehicle, number of passengers permitted, condition and maintenance of vehicles, inspection thereof, etc., financial responsibility of operators, investigation of character of prospective licensees and continuing supervision thereof, requirements for maintenance of adequate insurance, determination of public convenience and necessity with respect to number of certain intrastate vehicles, i.e. livery and taxicabs, which are to be permitted on the city streets, and regulation of taxi fares through meters.

railroads was to be canceled out in September of that year, "which would make it appear that the railroads were taking the position of dictating who would or could operate terminal vehicles in Chicago; that he did not think that was right and had prepared an ordinance with the assistance of Mr. Gross, and had it introduced in the city council and referred it to the committee; that subsequently he had discussed said ordinance with Mr. Grossman of the corporation counsel's office and that, as a result of his conference with Mr. Grossman, it would appear that, while he was on the right track in the matter, his method of approach was wrong."

Mr. Grossman informed the committee that he had looked over the ordinance "as introduced" by the chairman and was of the opinion that it was not in proper form; but that he believed the objective could be obtained in some other way. He said he would endeavor to prepare and submit an ordinance on this subject.

The chairman's proposed ordinance, which met with Mr. Grossman's objection as to form, and which was laid aside, [fol. 192] in brief would have granted an exclusive franchise for ten years to Parmelee for the operation of terminal vehicles to transfer passengers and their baggage between railroad stations.¹²

On July 26, 1955, the chairman stated that the committee was in session to receive a report from Mr. Grossman who had prepared a substitute ordinance which would accomplish what the committee had in mind, namely, placing the licensing and operation of terminal vehicles under the complete control of the city of Chicago, whereas, as

¹² § 2 read: "Subject to all the conditions of this ordinance, exclusive permission and authority is hereby granted to the licensee to operate terminal vehicles in the City for a period of ten (10) years, commencing on . . . , 1955, and ending on . . . , 1965."

§ 4 provided: "It is unlawful for any person to be an operator of one or more terminal vehicles on any public way from place to place within the corporate limits of the city unless such terminal vehicles are licensed by the City as terminal vehicles. * * *"

§ 11 provided: "Upon the effective date of this ordinance, the commissioner shall issue licenses hereunder to licensee in not to exceed the number of licenses held by such licensee on April 1, 1955. * * *"

the code then provided, the only one who could secure a license for the operation of a terminal vehicle was someone who had a contract with the railroads.

On recommendation of the committee, the council on the same day passed the ordinance now under attack.¹³

1. The city and Parmelee concede that Transfer is engaged in interstate commerce. In *United States v. Yellow Cab Co.*, 332 U.S. 218, 228, Parmelee's operation (including that part now being carried on by Transfer) was held to be an integral step in an interstate movement and, therefore, a constituent part of interstate commerce.¹⁴ The court pointed out that Chicago is the terminus of a large number of railroads engaged in interstate passenger traffic and that a great majority of the persons making interstate railroad trips which carry them through Chicago must disembark from a train at one railroad station, travel from that station to another some two blocks to two miles distant, and board another train at the latter station; that Parmelee had contracted with the railroads to provide this transportation by special cabs carrying seven to ten passengers. The court said that Parmelee's contracts were exclusive in nature, adding:

[fol. 193] "The transportation of such passengers and their luggage between stations in Chicago is clearly a part of the stream of interstate commerce. When persons or goods move from a point of origin in one state to a point of destination in another, the fact that a part of that journey consists of transportation by an independent agency solely within the boundaries of one state does not make that portion of the trip any less interstate in character. *The Daniel Ball*, 10 Wall. 557, 565. That portion must be viewed in its relation to the entire journey rather than in isolation. So viewed, it is an integral step in the interstate movement. See *Stafford v. Wallace*, 258 U.S. 495.

¹³ Herein sometimes referred to as the 1955 ordinance.

¹⁴ The destination intended by the passenger when he begins his journey and known to the carrier, determines the character of the commerce, whether interstate or not. *Sprout v. South Bend*, 277 U.S. 163, 168.

"Any attempt to monopolize or to impose an undue restraint on such a constituent part of interstate commerce brings the Sherman Act into operation. * * *"

Obviously these holdings conform with the following well-established principles: (1) a state may not obstruct or lay a direct burden on the privilege of engaging in interstate commerce, *Furst v. Brewster*, 282 U.S. 493, 498; *Mich. Com. v. Duke*, 266 U.S. 570, 577, 69 L. ed. 445; but (2) nevertheless it may incidentally and indirectly affect it by a bona fide, legitimate, and reasonable exercise of its police power. 15 C.J.S. 266. In *Dahnke-Walker Co. v. Bondurant*, 257 U.S. 282, 290, the court said:

"The commerce clause of the Constitution, Art. I, §8, cl. 3, expressly commits to Congress and impliedly withholds from the several States the power to regulate commerce among the latter. Such commerce is not confined to transportation from one State to another, but comprehends all commercial intercourse between different States and all the component parts of that intercourse. * * *"

The power here referred to may be exercised, not only in an act of Congress, but also in a regulation by the Interstate Commerce Commission. 15 C.J.S. 274.

Part I of the Interstate Commerce Act¹⁵ deals with railroads as well as other subjects not relevant here. §3 (3) thereof, in its presently pertinent provisions, appeared in the original act of February 4, 1887.¹⁶ It provides that all carriers of passengers subject to the act shall afford all [fol. 194] reasonable facilities for the interchange of traffic between their respective lines and for the receiving, forwarding and delivering of passengers to and from connecting lines.¹⁷ *Central Transfer Co. v. Terminal R. R.*, 288 U.S. 469, 473, note 1.

¹⁵ 49 U.S.C.A. §§ 1-27.

¹⁶ § 3, second unnumbered paragraph, 24 Stat. 380.

¹⁷ There is no warrant for limiting the meaning of "connecting lines" to those having a direct physical connection. The term is commonly used as referring to all the lines making up a through route. *Atlantic Coast Line R. Co. v. U. S.*, 284 U.S. 288, 293.

Part II of the same act¹⁸ deals with motor carriers. As amended in 1940, 302(c)¹⁹ provides as follows:

“§202(c) “Notwithstanding any provision of this section or of section 203, the provisions of this part, [Part II], except the provisions of section 204 relative to qualifications and maximum hours of service of employees and safety of operation and equipment, shall not apply—

“(1) to transportation by motor vehicle by a carrier by railroad subject to part I, * * * incidental to transportation or service subject * * * [thereto] in the performance within terminal areas of transfer, collection, or delivery services; but such transportation shall be considered to be and shall be regulated as transportation subject to part I when performed by such carrier by railroad * * *;

“(2) to transportation by motor vehicle by any person (whether as agent or under a contractual arrangement) for a common carrier by railroad subject to part I, * * * in the performance within terminal areas of transfer, collection, or delivery service; but such transportation shall be considered to be performed by such carrier * * * as part of, and shall be regulated in the same manner as, the transportation by railroad, * * * to which such services are incidental.”

In Part I, §6(1) of the Interstate Commerce Act²⁰ requires every common carrier to file with the commission tariffs (therein referred to as schedules), for transportation, including joint rates over through routes. In this [fol. 195] respect a tariff is to be treated the same as a statute. *Pennsylvania R. Co. v. International Coal Min. Co.*, 230 U.S. 183, at 197, 57 L. ed. 1446, 1451.

Relevant tariffs were filed with the Interstate Commerce Commission on behalf of the Terminal Lines.

¹⁸ 49 U.S.C.A. §§ 301-327 (1951 ed.).

¹⁹ 56 Stat. 300, where this section is known as section 202(c).

²⁰ 49 U.S.C.A. § 6(1).

The agreement of October 1, 1955²¹ obligates Transfer to perform all the required passenger and hand baggage transfer service from the terminal station in Chicago of each incoming line to the terminal station in Chicago of each outgoing line, all at the expense of the latter, for the period beginning October 1, 1955 and ending September 30, 1960. This service (which has been since October 1, 1955 performed by Transfer) replaced the Parmelee service, with the exception of two types of operations local in their nature,²² consisting of (a) transportation of friends or relatives accompanying a coupon holder between stations, and (b) transportation of a coupon holder to any hotel or other terminus "in the loop district of Chicago", as requested of the driver by the coupon holder.

2. We conclude that Transfer is an instrumentality used by Terminal Lines in interstate commerce and is subject to control of the federal government. We also conclude that the city can neither give nor take away such authority of Transfer to operate and that the city has no power of control over Transfer, except the control which it has generally in exercising its police power pertaining to such matters as public safety, maintenance of streets and the convenient operation of traffic. For a more detailed statement of the scope of such police power, see *Continental Baking Co. v. Woodring*, 286 U.S. 352.

This is not a case in which a motor vehicle operator is denied the privilege of operating on a particular highway because of the congestion of traffic thereon, such as was true in *Bradley v. Public Utility Commission*, 289 U.S. 92, (on which, for some reason not clear to us, the city relies), but rather we have a case where an ordinance, in effect, bars Transfer from the entire network of highways within the downtown area of Chicago.

²¹ The Baltimore and Ohio Chicago Terminal Railroad Company, Chicago and Western Indiana Railroad Company and Chicago Union Station Company, therein referred to as "depot companies", are also parties to said agreement. That fact is not controlling in the decision of this case.

²² See *Status of Parmelee Trans. Co.*, 288 I.C.C. 95, at 100.

[fol. 196] Pursuant to federal law, Terminal Lines have assumed an obligation to furnish the service in question as an interstation link in interstate commerce. The integration of this service with the complex, and occasionally changing, schedules of the Terminal Lines and the ebb and flow of passenger traffic existing in the various stations, requires a continuing and intimate knowledge thereof, which the Terminal Lines possess. The city is not equipped to function effectively in this area. It follows that the choice as to the instrumentality to be used for that purpose properly belongs to the Terminal Lines. These facts preclude the selection of an operator of terminal vehicles by anyone other than the Terminal Lines. While the city has power to regulate the operation of terminal vehicles incidentally to its regulation of street traffic generally, it has no power, directly or indirectly, to designate who shall own or operate such vehicles. The prior ordinance recognized this situation. It was limited to terminal vehicles having contracts with the Terminal Lines and, as to which vehicles, it exercised certain police powers of the city relating to traffic regulation. That ordinance made no attempt, and it was not intended, to select the operator of the service. In contrast, the 1955 ordinance consists of provisions which, in effect, name Parmelee as the exclusive operator of terminal vehicles in Chicago even though it has no contract with the Terminal Lines which are under a federally imposed obligation to furnish this terminal facility. Each of the Terminal Lines, which sells through tickets calling for interstate transportation in Chicago, thereby assumes an individual obligation to the passenger to furnish that service. Yet, under the 1955 ordinance, that railroad would have no direct control over the operator of that service, and no opportunity to protect itself by an agreement indemnifying it from claims of passengers for damages arising out of the negligence of the operator. Other obvious considerations point to the practical necessity of a continuing control by the Terminal Lines of the instrumentality furnishing the service covered by the coupons sold by those lines to interstate passengers.

3. However, the city contends that the 1955 ordinance not only retains the police regulations of the prior ordi-

nance, but demonstrates the city's concern with all passenger vehicles for hire, and specifically with the effect of the number of taxicabs as well as terminal vehicles on the safety of existing vehicular and pedestrian traffic. [fol. 197] The city contends that in this respect the ordinance is valid as an exercise of the police power.

But the Terminal Lines argue that the 1955 ordinance was adopted for the sole and evident purpose, not of police power regulation, but of economic regulation. They say that, not only would the 1955 ordinance add nothing in respect to police power regulations that were not contained in the prior ordinance, but that the 1955 ordinance added "elaborate requirements for proof of public convenience and necessity and other elements of economic regulation of interstate commerce * * *." They add "that these new economic regulations would apply to all except Parmelee; Parmelee was granted a perpetual franchise free from these requirements. The amendment eliminated the requirement that no one could obtain a license unless he had a contract for interstation transfer with the railroads. The amendment unmistakably marked the ordinance as an economic regulation not within the city's power."

Significant is §28-31.1 of the 1955 ordinance which provides that no license for any terminal vehicle shall be issued except in the annual renewal of such license or upon transfer to permit replacement of a vehicle for that licensed, unless, after a public hearing, the commissioner shall report to the council that public convenience and necessity require additional terminal vehicle service and shall recommend the number of such vehicle licenses which may be issued. It is further provided that, in determining whether public convenience and necessity require such additional service, the following, *inter alia*, shall be considered: "2. The effect of an increase in the number of such vehicles on the safety of existing vehicular and pedestrian traffic in the area of their operation; * * *."

Terminal Lines argue that these are the only provisions of the 1955 ordinance which could even appear to relate to public safety. But they aver that, as a purported safety measure, this is sham and spurious.

To us it appears that the cost of maintaining the terminal vehicle service, which is initially borne by Transfer and ultimately, to the extent of coupons issued and used, by the individual Terminal Lines, will operate effectively as an economic brake upon any unjustified increase in the number of such vehicles. Moreover, if and when a greater number is demanded by the growth of interstate passenger [fol. 198] traffic, the city would then have no right, in the guise of an exercise of its police power, to cripple interstate commerce by preventing a justifiable increase in the number of such vehicles required to meet the needs of that commerce.

We are thus led to conclude that there is no valid legal basis for the above-cited provisions of §28-31.1 of the 1955 ordinance. We are convinced that those provisions, which would in effect limit the number of terminal vehicle licenses to those held by Parmelee on July 26, 1955 and give Parmelee perpetual control thereof, constitute a designation of Parmelee by the council of the city, in lieu of Transfer, the instrumentality selected by the Terminal Lines, rather than an exercise of the city's police power over traffic. In this critical aspect the 1955 ordinance is invalid. If there were any doubt that this conclusion is correct, the legislative history of the ordinance dispels that doubt.

At meetings of the committee which recommended the 1955 ordinance for passage, the committee chairman made it clear that the objective sought was the assumption by the city of the authority to designate the instrumentality which was to operate terminal vehicles between railroad stations in Chicago. The proceedings of the committee fail to indicate that the chairman or any member of the committee was interested in traffic regulations or any other aspect of the city's police power.

In attempting to justify the 1955 ordinance, which admittedly retained police regulations contained in the prior ordinance, the city points to photographs of two transfer vehicles which, the city says, do not comply with retained §28-4.1, which provides that no vehicle having a seating capacity for more than 7 passengers shall be licensed as a public passenger vehicle unless at least 3

doors on each side or a fixed aisle space is provided, and retained §28-17, which provides that it is unlawful to permit more than one passenger to occupy the front seat with the chauffeur. There is no indication in the record that any terminal vehicles used by Transfer, except the two appearing in the photographs, violate §28-4.1. Even if §28-4.1 and §28-17 are violated, that fact does not empower the city to bar, or even suspend, the operations of Transfer. *Castle v. Hayes Freight Lines*, 348 U.S. 61. [fol. 199]. The fact that Hayes was operating trucks under a federal certificate of convenience and necessity, under Part II of the Interstate Commerce Act,²³ does not distinguish that case in principle from the present case in which Transfer is engaged in a federally authorized activity. See 49 U.S.C.A. §302(c)(2), *supra*. If Transfer's vehicles do not conform to the requirements contained in the prior ordinance,²⁴ the city may refuse to issue licenses for the non-conforming vehicles and penalize their unlicensed operation in accord with §28-32. So, also, whenever Transfer is found guilty of violating §28-17 the city may proceed against it according to the penalties section.²⁵

Undoubtedly the city has power to require that one engaged exclusively in interstate commerce may be required to procure from the city a license granting permission to use its highways and in addition pay a license fee demanded of all persons using automobiles on its highways as a tax for the maintenance of the highways and the administration of the laws governing the same. Highways being public property, users of them, although engaged exclusively in interstate commerce, are subject to regulation by the state or municipality to ensure safety and

²³ 49 U.S.C.A. § 301, *et seq.*

²⁴ Ch. 28, Chicago Municipal Code.

²⁵ § 28-32. "Any person violating any provision of this chapter for which a penalty is not otherwise provided shall be fined not less than \$5.00 nor more than \$100.00 for the first offense, not less than \$25.00 nor more than \$100.00 for the second offense during the same calendar year, and not less than \$50.00 nor more than \$100.00 for the third and succeeding offenses during the same calendar year and each day that such violation shall continue shall be deemed a separate and distinct offense."

convenience and the conservation of the highways. Users of them, although engaged exclusively in interstate commerce, may be required to contribute to their cost and upkeep. Common carriers for hire, who make the highways their place of business, may properly be charged a tax for such use. *Clark v. Poor*, 274 U.S. 554, 557.

Both the language of the 1955 ordinance and its legislative history point to the fact that it is not legislation governing the manner of conducting a business or providing for a contribution toward the expense of highway maintenance, but that it requires a license, the granting of which, in turn, is made dependent upon the consent of the city to the prosecution of a business. This is not a valid requirement. See *Sault Ste. Marie v. International Transit Company*, 234 U.S. 333, 340, 58 L. ed. 1337, 1340.

[fol. 200] As we have seen, the 1955 ordinance eliminated from §28-1 of the prior ordinance a requirement that a terminal vehicle must be operated under contracts with railroad and steamship companies, and, by a new section, §28-31.1, in effect permitted Parmelee's existing terminal vehicle licenses to become perpetual by means of annual renewal or by transfer to a replacement vehicle, and also provided, in effect, that Transfer could not obtain any terminal vehicle license unless it proved to the satisfaction of the public vehicle license commissioner "that public convenience and necessity shall require additional terminal vehicle service".

In *Buck v. Kuykendall*, 267 U.S. 307, it appears that Buck wished to operate an autostage line as a common carrier for hire for through interstate passengers, over a public highway in the state of Washington. Having complied with the state laws relating to motor vehicles and owners and drivers, and alleging willingness to comply with all applicable regulations concerning common carriers, Buck applied to the state for a prescribed certificate of public convenience and necessity. It was refused on the ground that the territory involved was already being adequately served by the holder of a certificate and that adequate transportation facilities were already being provided by four connecting autostage lines, all of which held such certificates from the state. The

state, relied upon its statute which prohibited common carriers for hire from using the highways by auto vehicles between fixed termini, or over regular routes, without having first obtained from the state a certificate of public convenience and necessity. Speaking of that statute, the court said, at 315:

"* * * Its primary purpose is not regulation with a view to safety or to conservation of the highways, but the prohibition of competition. It determines not the manner of use, but the persons by whom the highways may be used. It prohibits such use to some persons while permitting it to others for the same purpose and in the same manner. * * * Thus, the provision of the Washington statute is a regulation, not of the use of its own highways, but of interstate commerce. Its effect upon such commerce is not merely to burden but to obstruct it. Such state action is forbidden by the Commerce Clause. * * *

[fol. 201] To the same effect is *Mayor of Vidalia v. McNeely*, 274 U.S. 676, at 683.²⁶

4. We hold that it was unnecessary for Transfer to apply for licenses under the 1955 ordinance, because the issuance thereof unlawfully required a consent by the city

²⁶ Both sides in the case at bar rely on *Columbia Terminals Co. v. Lambert*, 30 F. Supp. 28, appeal dismissed, 309 U.S. 620. The court there said that the question whether the state could demand that Columbia Terminals prove that its interstate commerce transfer operation would benefit the state, in order to obtain a state permit therefor, was not before it, because the state expressly admitted it lacked such power and made no such demand. The court said, at 31:

"Since this statute applies to interstate as well as intrastate contract haulers, if the complaint alleged or the evidence disclosed such action on the part of the State Commission, plaintiff would be entitled to relief from such action on the part of the state officials. * * * But when the State * * * undertakes to exercise the right to say what interstate commerce will benefit the State and what will not, such action, with certain exceptions immaterial here, constitutes an unconstitutional violation of the commerce clause."

While this is dictum, it is in accord with our holding herein.

to the prosecution of Transfer's business and was not merely a step in the regulation thereof. Being unnecessary, the relief prayed for herein may be granted without a showing that such application had been made before this suit was filed.

For the reasons hereinbefore set forth, the judgment of the district court is reversed and this cause is remanded to that court for further proceedings not inconsistent with the views herein set forth.

Reversed and Remanded.

[fol. 202] IN UNITED STATES COURT OF APPEALS FOR THE
SEVENTH CIRCUIT

Before Hon. J. EARL MAJOR, Circuit Judge, Hon. H. NATHAN SWAIM, Circuit Judge, Hon. ELMER J. SCHNACKENBERG, Circuit Judge.

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY
COMPANY, ET AL., Plaintiffs-Appellants,

No. 11692

v.

CITY OF CHICAGO, ET AL., Defendants-Appellees
and

PARMELEE TRANSPORTATION COMPANY, Defendant-
Intervenor-Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

JUDGMENT—January 17, 1937

On consideration whereof, it is ordered and adjudged by this court that the judgment of the said District Court

in this cause appealed from be, and the same is hereby, Reversed, with costs; and that this cause be, and the same is hereby, Remanded to the said District Court for further proceedings not inconsistent with the views expressed in the opinion of this Court filed this day.

[fol. 203] IN UNITED STATES COURT OF APPEALS FOR THE
SEVENTH CIRCUIT

Chicago 10, Illinois

[Title omitted]

ORDER DENYING PETITION FOR REHEARING—

February 20, 1957

It is ordered by the Court that appellees' petitions for a rehearing of this cause be, and the same are hereby, Denied.

[fol. 204] [File endorsement omitted]

[fol. 205] IN THE UNITED STATES COURT OF APPEALS FOR THE
SEVENTH CIRCUIT

[Title omitted]

NOTICE OF APPEAL TO THE SUPREME COURT OF THE
UNITED STATES—Filed March 27, 1957

I.

Notice is hereby given that Parmelee Transportation Company, Defendant-Intervenor-Appellee, hereby appeals to the Supreme Court of the United States from the judgment entered by the Court of Appeals of the Seventh Circuit, on January 17, 1957, reversing the judgment of the United States District Court for the Northern District of Illinois, Eastern Division, entered on January 12, 1956.

[fol. 206] This appeal is taken pursuant to 28 U.S.C. § 1254(2).

II.

The clerk will please prepare a transcript of the record in this cause for transmission to the Clerk of the Supreme Court of the United States and include in said transcript the following:

Transcript of record filed February 20, 1956.

Judgment and order of the Court of Appeals of the Seventh Circuit entered January 17, 1957.

Order of the Court of Appeals of the Seventh Circuit entered February 20, 1957, denying Appellees' petitions for rehearing.

Notice of Appeal to the Supreme Court of the United States.

III.

The following questions are presented by this appeal:

1. Whether the Court of Appeals erred in holding that the City of Chicago could not constitutionally require the appellee Railroad Transfer Service, Inc., a non-certificated motor carrier engaged primarily in interstate commerce wholly within the City of Chicago, to secure a license in order to use the public streets and highways within that city, where the license requirement was a means of effectuating a plan of regulation relating to traffic control, public safety, and maintenance of the streets and highways within the City of Chicago.

[fol. 207] 2. Whether the Court of Appeals erred in gratuitously anticipating a constitutional question by not requiring the appellee Railroad Transfer Service, Inc. to exhaust its administrative remedies by applying for a license as required by the Municipal Code of the City of Chicago, §§ 28-1 through 28-32.

3. Whether the Court of Appeals erred in imputing improper motives to the City Council of the City of Chicago

in order to hold that the ordinance in question was unconstitutional as applied to the appellee, Railroad Transfer Service, Inc.

4. Whether the Court of Appeals erred in substituting its judgment for that of the City Council of the City of Chicago with respect to whether the licensing of motor vehicles performing transfer services within the City of Chicago was an appropriate means of effectuating the police power of the City of Chicago, exercised for the purpose of controlling traffic, effecting public safety and maintaining streets and highways within the City of Chicago.

Lee A. Freeman, Attorney for Parmelee Transportation Company.

[fol. 208] PROOF OF SERVICE (omitted in printing).

[fol. 210] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 211] SUPREME COURT OF THE UNITED STATES
No. 905, October Term, 1956

CITY OF CHICAGO, a Municipal Corporation Petitioner,

v.

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY;
THE BALTIMORE AND OHIO RAILWAY COMPANY; ET AL.

ORDER ALLOWING CERTIORARI—Filed May 27, 1957

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

[fol. 213] SUPREME COURT OF THE UNITED STATES

No. 906, October Term, 1956

PARMELEE TRANSPORTATION CO., ET AL., Appellants,

v.

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY CO., ET AL.

ORDER POSTPONING JURISDICTION—May 27, 1957

Appeal from and petition for writ of certiorari to the United States Court of Appeals for the Seventh Circuit.

The statement of jurisdiction in this case having been submitted and considered by the Court, further consideration of the question of jurisdiction is postponed to the hearing of the case on the merits. Counsel are invited to discuss the following jurisdictional issues:

1. Whether Parmelee Transportation Co. has standing to seek review here on appeal or by writ of certiorari.

2. Whether the judgment of the Court of Appeals is "final" so as to permit review by way of appeal under 28 U.S.C. § 1254(2). Cf. *Slaker v. O'Connor*, 278 U.S. 188, 189; *South Carolina Electric & Gas Co. v. Flemming*, 351 U.S. 901.

in proper form; and further that said counsel "had prepared a substitute ordinance which would accomplish what the committee had in mind, namely, placing the licensing and operation of terminal vehicles under the complete control of the City of Chicago." (Appendix B, p. 43.)

The Court of Appeals was in error, *first* as to the nature of the proposed franchise ordinance; *second*, as to the nature of the objection to said proposed ordinance by counsel; and *third*, as to the meaning and purpose of the substitute ordinance.

The first error appears in the definition of "terminal vehicle" in the proposed franchise ordinance which clearly indicates that it was not for the operation of terminal vehicles "to transfer passengers and their baggage *between* railroad stations," as stated by the Court of Appeals (Appendix B, p. 43), but was "for the transfer of passengers *to and from* terminal stations of railroad and steamship companies." (Plaintiffs' Exhibit No. 3, Tr. 85.)

The second error was that counsel for the city did not state that he objected to the *form* of the proposed franchise ordinance, but he questioned the *corporate power* of the city to enact such ordinance (Tr. 91). Counsel no doubt had in mind the statutory provisions printed in Appendix A hereto, all of which relate to police regulations, *not including an exclusive grant* to use the city streets for local transportation of passengers for hire.

The third error was that counsel for the city stated quite clearly that terminal vehicles as defined (before the 1955 amendments) did not embrace those vehicles that operated *between* railroad stations. "The operation (was) from the railroad stations to points within the central business district. It is in the railroad terminal area, but it isn't necessarily *between* railroad stations. It may go from railroad stations to hotels and from hotels to railroad stations. That is the operation. And that operation can be continued

by amendments to the present ordinance without conflicting with any of the statutory provisions." (Tr. 92.)

The Court of Appeals evidently stated the facts which occurred at the meetings of June 21 and 26, 1955, from the minutes of the committee on local transportation, Plaintiffs' Exhibits Nos. 5 and 6 (Tr. 93 through 96), disregarding Plaintiffs' Exhibit No. 4, which is a verified transcript of the colloquy between the chairman and members of the committee and counsel for the city. The statement of the chairman cannot be ascribed to counsel for the city and the chairman's motives in submitting for consideration of the city council a proposed ordinance or ordinances certainly cannot be ascribed to the city council in the passage of an ordinance.

Moreover this court has repeatedly said that it is not the function of the Federal courts to question the motives of a legislative body. *Arizona v. California* (1931), 283 U. S. 423; 75 L. Ed. 1154, 1166. *Tenney v. Brandhove* (1951), 341 U. S., 367; 95 L. Ed. 1019, 1027.

The ordinance which was subsequently passed differed not only in form but in substance from that originally proposed by the chairman. It is neither a franchise for a term of years nor exclusive, but an annual license ordinance subject to amendment or repeal under the police power of the city to regulate traffic and the use of streets for local transportation of persons and property for hire.

The courts below ignored the definition of "Terminal vehicle", as amended by the 1955 ordinance, which divorced terminal vehicle passengers from railroad and steamship carriers. "The destination intended by the passenger when he begins his journey and known to the carrier," to determine the character of the commerce, whether interstate or not, is absent from the Ordinance. *Sprout v. South Bend*, 277 U. S. 163, 168, cited by the Court of Appeals, Note 44, Appendix B, p. 44.

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JOHN T. FEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

No. ~~885~~ 103

CITY OF CHICAGO, A MUNICIPAL CORPORATION,

Petitioner

vs.

THE ATCHISON, TOPEKA, AND SANTA FE RAILWAY COMPANY; THE BALTIMORE AND OHIO RAILROAD COMPANY; THE CHESAPEAKE AND OHIO RAILWAY COMPANY; CHICAGO & EASTERN ILLINOIS RAILROAD COMPANY; CHICAGO AND NORTH WESTERN RAILWAY COMPANY; CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY; CHICAGO GREAT WESTERN RAILWAY COMPANY; CHICAGO, INDIANAPOLIS AND LOUISVILLE RAILWAY COMPANY; CHICAGO, MILWAUKEE, ST. PAUL AND PACIFIC RAILROAD COMPANY; CHICAGO NORTH SHORE AND MILWAUKEE RAILWAY; CHICAGO, ROCK ISLAND AND PACIFIC RAILROAD COMPANY; CHICAGO SOUTH SHORE AND SOUTH BEND RAILROAD; ERIE RAILROAD COMPANY; GRAND TRUNK WESTERN RAILROAD COMPANY; GULF, MOBILE AND OHIO RAILROAD COMPANY; ILLINOIS CENTRAL RAILROAD COMPANY; MINNEAPOLIS, ST. PAUL & SAULT STE. MARIE RAILROAD COMPANY; THE NEW YORK CENTRAL RAILROAD COMPANY; THE NEW YORK, CHICAGO AND ST. LOUIS RAILROAD COMPANY; THE PENNSYLVANIA RAILROAD COMPANY; WABASH RAILROAD COMPANY; AND RAILROAD TRANSFER SERVICE, INC., CORPORATIONS,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

JOHN C. MELANIPHY,

Corporation Counsel of the City of Chicago.

JOSEPH F. GROSSMAN,

Special Assistant Corporation Counsel,

Room 511--City Hall,

Chicago 2, Illinois,

Attorneys for Petitioner.

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1956.

No. _____

CITY OF CHICAGO, A MUNICIPAL CORPORATION,

Petitioner

vs.

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY; THE BALTIMORE AND OHIO RAILROAD COMPANY; THE CHESAPEAKE AND OHIO RAILWAY COMPANY; CHICAGO & EASTERN ILLINOIS RAILROAD COMPANY; CHICAGO AND NORTH WESTERN RAILWAY COMPANY; CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY; CHICAGO GREAT WESTERN RAILWAY COMPANY; CHICAGO, INDIANAPOLIS AND LOUISVILLE RAILWAY COMPANY; CHICAGO, MILWAUKEE, ST. PAUL AND PACIFIC RAILROAD COMPANY; CHICAGO NORTH SHORE AND MILWAUKEE RAILWAY; CHICAGO, ROCK ISLAND AND PACIFIC RAILROAD COMPANY; CHICAGO SOUTH SHORE AND SOUTH BEND RAILROAD; ERIE RAILROAD COMPANY; GRAND TRUNK WESTERN RAILROAD COMPANY; GULF, MOBILE AND OHIO RAILROAD COMPANY; ILLINOIS CENTRAL RAILROAD COMPANY; MINNEAPOLIS, ST. PAUL & SAULT STE. MARIE RAILROAD COMPANY; THE NEW YORK CENTRAL RAILROAD COMPANY; THE NEW YORK, CHICAGO AND ST. LOUIS RAILROAD COMPANY; THE PENNSYLVANIA RAILROAD COMPANY; WABASH RAILROAD COMPANY; AND RAILROAD TRANSFER SERVICE, INC., CORPORATIONS.

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

Petitioner, City of Chicago, a municipal corporation of Illinois, respectfully applies for a writ of certiorari to

review the judgment of the United States Court of Appeals for the Seventh Circuit, in cause No. 11692, entitled *The Atchison, Topeka and Santa Fe Railway Co., et al. Plaintiffs-Appellants v. City of Chicago, a municipal corporation, et al., Defendants-Appellees and Parmelee Transportation Company, Defendant-Intervenor-Appellee*, on appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

The District Court, Honorable Walter J. LaBuy presiding, entered summary judgment against the plaintiffs and dismissed the action, pursuant to findings of fact and conclusions of law, printed in the transcript of record filed herein, pps. 154 to 160 (hereafter Tr.). The opinion of the District Court is reported in 136 F. Supp. 476. The opinion of the Court of Appeals is not yet reported and is printed in Appendix B hereto.

JURISDICTION.

The judgment of the Court of Appeals was entered January 17, 1957. Rehearing was denied February 20, 1957, Certified Record (hereafter Cert. R.) 17, attached to certified copy of Transcript. The jurisdiction of this Court is invoked under 28 U. S. C. Sec. 1254 (1).

QUESTIONS PRESENTED FOR REVIEW.

1. Did the courts below properly entertain jurisdiction on the constitutional question involving control of interstate commerce, when the paramount issue presented by the pleadings involved the construction of a city ordinance governed by state law.
2. Should the courts below have decided the non-constitutional question of the applicability or meaning of the ordinance instead of remitting the parties to the state courts for determination of that question.

3. Does the record support the conclusion of the Court of Appeals that counsel for the city who drafted the ordinance, as a substitute for a proposed special franchise to Parmelee Transportation Company (hereafter "Parmelee"), objected to the form and not to the substance of the ordinance first proposed.

4. Does the record support the conclusion of the Court of Appeals that the ordinance drafted by counsel for the city was in substance and in effect the same as the proposed special franchise to Parmelee.

5. Was the Court of Appeals justified in considering the motives of any member or members of the city council to determine the meaning, purpose or effect of the ordinance.

6. Does the ordinance in effect give Parmelee perpetual control of terminal vehicle licenses in the city of Chicago, as indicated in the Opinion of the Court of Appeals.

7. Does the ordinance, in effect, bar Railroad Transfer Service, Inc. (hereafter "Transfer") from the entire network of highways within the downtown area of Chicago, as stated by the Court of Appeals.

8. Does Transfer operate "terminal vehicles" as defined by the ordinance.

STATUTES AND ORDINANCES INVOLVED.

The statutory provisions involved are Secs. 23-1, 23-10, 23-27, 23-51, 23-52, 23-81, 23-105 and 23-106 of the Revised Cities and Villages Act of Illinois (Ill. Rev. Stat. 1955, Chap. 24, Art. 23, pps. 581, 582, 584, 586, 589).

The city ordinance involved is an ordinance passed by the city council of the city of Chicago July 26, 1955, amending Secs. 28-1 and 28-31 of the Municipal Code of Chicago and adding two new sections to said Code, numbered 28-31.1 and 28-31.2 (Tr. 44, 45). The sections of said ordinance

amended and added became part of Chapter 28 of the Municipal Code of Chicago entitled "Public Passenger Vehicles" (Cert. R. 57). Said Chapter 28, as amended July 26, 1955, will hereafter be referred to as the "Ordinance".

The statutory provisions and Ordinance cited above are printed in Appendix A hereto. The amendments to the Ordinance, passed July 26, 1955, are emphasized by italics.

STATEMENT OF CASE.

Respondent railroads (hereafter "Terminal Lines") and Transfer commenced action in the District Court against City of Chicago, petitioner, and its officers, for declaratory judgment and injunctive relief against the enforcement of the Ordinance. They asked the District Court to declare that the Ordinance is not applicable to operations carried on by Transfer under contracts with Terminal Lines, exclusively for the transfer of passengers between terminal stations; otherwise to declare the Ordinance void. Jurisdiction was invoked under 28 U. S. C. Secs. 1331 and 1337, the amount in controversy exceeding \$3000.00 (Tr. 6, 7).

Parmelee moved to intervene as a defendant and asked that its petition for intervention be considered and treated as an answer and claim of the intervening petitioner in this proceeding (Tr. 60). The motion of Parmelee was allowed (Tr. 70).

City of Chicago and its officers, defendants, filed a motion for summary declaratory judgment, pursuant to Rule 56 of the Federal Rules of Civil Procedure (Tr. 71), to determine:

1. Whether plaintiff, Transfer, is a public utility under the laws of Illinois;

2. Whether said plaintiff, by virtue of its contract with plaintiff Terminal Lines, is operating its vehicles within

the city of Chicago exclusively as agent for and in behalf of plaintiff Terminal Lines as public utilities under the laws of Illinois;

3. Whether said plaintiff's operations are confined to the transportation of passengers on through route railroad and steamship transportation tickets between points outside of the corporate limits of the city in intrastate and interstate commerce;

4. Whether said plaintiff operates any vehicle on any public way for the transportation of passengers for hire from place to place within the corporate limits of the city, as provided in Section 28-2 of the Municipal Code of Chicago.

5. Whether said plaintiff is operating terminal vehicles within the city of Chicago, as defined in Sec. 28-1 of the Municipal Code of Chicago, as amended July 26, 1955;

6. Whether any of said plaintiff's operations are in local transportation of passengers at rates of fares subject to Section 28-31.2 of the Municipal Code of Chicago, as amended July 26, 1955;

7. Whether any of said plaintiff's operations are subject to any of the provisions of Chapter 28 of the Municipal Code of Chicago.

The District Court permitted the city to file its motion (Tr. 73); and found in its opinion and judgment order that Transfer's vehicles are "terminal vehicles" as defined in Section 28-1 and are subject to the provisions and regulations of Chapter 28 of the Municipal Code of Chicago, as amended, applicable thereto (Tr. 115).

The Court of Appeals did not pass on the question whether the Ordinance is applicable to Transfer's operations. The Court reversed and remanded the judgment of the District Court, after concluding that Section 28-31.1 of the 1955 ordinance limited the number of terminal

vehicle licenses to those held by Parmelee on July 26, 1955, and therefore is invalid. Appendix B, p. 50.

REASONS FOR GRANTING THE WRIT.

The Court of Appeals has rendered a decision holding invalid a most salutary city ordinance duly passed by the city council in the exercise of governmental powers of great importance delegated to the corporate authorities of the city by state law, for the protection of public health and safety, and for public convenience.

Although not explicitly stated in the opinion, the decision of the Court of Appeals is based on a construction of the Ordinance which interferes with the constitutional authority of Congress to regulate interstate commerce. Whether the Ordinance is susceptible to such construction is primarily an important state question which should be resolved by applicable state law.

It is clearly the duty of the Supreme Court to ascertain from the record whether the courts below had jurisdiction, though that question was not raised by counsel in the District Court or the Court of Appeals. *U. C. & L. M. Ry. Co. v. Swan* (1884), 111 U. S. 379, 382. *Shanferoke C. & S. Corp. v. Westchester S. Corp.* (1935), 293 U. S. 449; 79 L. Ed. 583, 586. *Clark v. Paul Gray* (1939), 306 U. S. 583; 83 L. Ed. 1001.

The policy of this court in avoiding or postponing consideration of constitutional questions in advance of necessity has not been limited to jurisdictional determinations. In *Rescue Army v. Municipal Court* (1947), 331 U. S. 549, 91 L. Ed. 1666, 1678, this Court said:

"The policy, however, has not been limited to jurisdictional determinations. For, in addition, the Court (has) developed, for its own governance in the cases confessedly within its jurisdiction, a series of rules under which it has avoided passing upon a large part

of all the constitutional questions pressed upon it for decision.' Thus, as those rules were listed in support of the statement quoted, constitutional issues affecting legislation will not be determined in friendly, non-adversary proceedings; in advance of the necessity of deciding them; in broader terms than are required by the precise facts to which the ruling is to be applied; if the record presents some other ground upon which the case may be disposed of; * * *"

The foregoing case is particularly pertinent to the issues in this case. Action was instituted by Terminal Lines and Transfer against the city as a friendly suit for declaratory judgment after a token threat of arrest was made to test the applicability to plaintiffs or validity of the 1955 amendments to the "Public Passenger Vehicles" ordinance. The city filed a motion for summary declaratory judgment on specific questions to determine the ultimate issue between plaintiffs and the city. As the case progressed, with intervention by Parmelee, seeking a restraining order (Tr. 61), the contest was developed principally between plaintiffs and intervenor.

In *Chicago v. Fieldcrest Rairies* (1941): 316 U. S. 168, 86 L. Ed. 1355, at p. 1357, this Court said:

"We granted the petition for certiorari (314 U. S. 604, *ante* 486, 62 S. Ct. 301), because of the doubtful propriety of the District Court and of the Circuit Court of Appeals in undertaking to decide such an important question of Illinois law instead of remitting the parties to the state courts for litigation of the state questions involved in the case. *Railroad Commission v. Pullman Co.*, 312 U. S. 496, 85 L. ed. 971, 61 S. Ct. 643.

"We are of the opinion that the procedure which we followed in the *Pullman Co.* case should be followed here. Illinois has the final say as to the meaning of the ordinance in question."

Reference to the Ordinance in Appendix A will disclose that it deals with local public passenger vehicles which are

not public utilities, pursuant to the corporate powers of the city under Article 23 of the Revised Cities and Villages Act. Section 23-51 of the Act which enables the city to license, tax and regulate hackmen, draymen, omnibus drivers, carters, cabmen, porters, expressmen and all others pursuing like occupations, and to prescribe their compensation, is necessarily limited to transportation service within the corporate limits of the city. *City of Rockford v. Heg* (1937), 366 Ill. 526; 9 N. E. 2d 317. Section 28-3 of the Ordinance, which applies to all classes of public passenger vehicles, indicates that the Ordinance does not apply to interurban operations.

Unless otherwise expressly provided, all of the provisions of the Ordinance, after the definitions, apply to "terminal vehicles" as defined, as well as to all other public passenger vehicles. In addition to the general provisions of the Ordinance, there are special provisions covering livery vehicles (Secs. 28-19 through 28-20); sight-seeing vehicles (Sec. 28-21); taxicabs (Secs. 28-22 through 28-30) and terminal vehicles (Secs. 28-31 through 28-31.2).

Section 28-31.1, limiting the number of terminal vehicles, subject to public convenience and necessity, which is the predominant subject of controversy in this case, follows the pattern limiting the number of taxicab licenses in Section 28-22.1, specific reference to which is made in Section 28-31.1 relating to terminal vehicles. A similar provision is applicable to livery vehicles by Section 28-19. It will be noted that Section 28-6 of the Ordinance provides that the commissioner shall issue all public passenger vehicle licenses for the license period ending on the 31st day of December following date of its issuance.

The foregoing provisions are consistent with Illinois cases holding that the Ordinance was passed pursuant to Section 23-105 of the Revised Cities and Villages Act, authorizing the city council to pass and enforce all nec-

essary police ordinances. *The People ex rel. Johns v. Thompson* (1930), 341 Ill. 466; 173 N. E. 137. *Yellow Cab Co. v. City of Chicago* (1947), 396 Ill. 388; 398; 71 N. E. 2d 652, 657.

The importance of this case is increased by the obvious fact that the decision of the Court of Appeals was based on the "legislative history" of the ordinance of June 26, 1955, amending Chapter 28 of the city code, without giving any consideration to the related provisions in the ordinance. For instance, the Court of Appeals said:

"We are thus led to conclude that there is no valid legal basis for the above cited provisions of Sec. 28-31.1 of the 1955 ordinance. We are convinced that those provisions, which would in effect limit the number of terminal vehicle licenses to those held by Parmelee on July 26, 1955 and give Parmelee perpetual control thereof, constitute a designation of Parmelee by the council of the city, in lieu of Transfer, the instrumentality selected by the Terminal Lines, rather than an exercise of the city's police power over traffic. In this critical aspect the 1955 ordinance is invalid. If there were any doubt that this conclusion is correct, the legislative history of the ordinance dispels that doubt." (Appendix B, p. 50.)

The Court of Appeals ignored all of the related provisions of Chapter 28 which was amended by the 1955 ordinance, including Sec. 28-6 limiting the license to one calendar year.

The Court of Appeals laid great stress upon meetings of the committee on local transportation of June 21 and 26, 1955 to show the intent of the chairman of the committee and his motive in the preparation of an ordinance granting an exclusive franchise to Parmelee for 10 years "for the operation of terminal vehicles to transfer passengers and their baggage *between* railroad stations," to which council for the city was said to have objected because it was not

The basic question at issue between the city and the respondents is whether Transfer is a "terminal vehicle," as that term is defined by the Ordinance (Tr. 6, 73, 101). That was the paramount issue argued in the District Court by Terminal Lines and Transfer ((Cert. R. 306 *et seq.*)).

CONCLUSION.

This case involves an important local transportation problem governed by local law; and petitioner respectfully prays that the writ of certiorari be granted.

Respectfully submitted,

JOHN C. MELANIPHY,

Corporation Counsel of the City of Chicago,

JOSEPH F. GROSSMAN,

Special Assistant Corporation Counsel,

Room 511—City Hall,

Chicago 2, Illinois,

Attorneys for Petitioner.

APPENDIX A.

ILLINOIS REVISED STATUTES, 1955.

Chap. 24—Cities and Villages.

23-1. (Grant of powers.) The corporate authorities of a municipality shall have the powers enumerated in Sections 23-2 to 23-113 inclusive.

23-10. (Regulate streets.) To regulate the use of the streets and other municipal property.

23-27. (Streets—Traffic and sales upon.) To regulate traffic and sales upon the streets, sidewalks, public places, and municipal property.

23-51. (License taxicab drivers, expressmen.) To license, tax and regulate hackmen, draymen, omnibus drivers, carters, cabmen, porters, expressmen, and all others pursuing like occupations, and to prescribe their compensation.

23-52. (License runners.) To license, tax, regulate, and prohibit runners for cabs, busses, railroads, ships, hotels, public houses, and other similar businesses.

23-81. (Promote health.) To do all acts and make all regulations, which may be necessary or expedient for the promotion of health or the suppression of disease.

23-105. (Police power.) To pass and enforce all necessary police ordinances.

23-106. (Ordinances and rules to execute powers—Limitations on punishments.) To pass all ordinances and make all rules and regulations, proper or necessary, to carry into effect the powers granted to municipalities, with such fines or penalties as may be deemed proper. No fine or penalty, however, except civil penalties provided for failure to make returns or to pay any taxes levied by the municipality shall

exceed \$200.00 and no imprisonment shall exceed six months for one offense.

MUNICIPAL CODE OF CHICAGO.

Chapter 28—Public Passenger Vehicles.

- 28- 1. Definitions
- 28- 2. License required
- 28- 3. Interurban operations
- 28- 4. Inspections
- 28- 4.1. Specifications
- 28- 5. Application
- 28- 6. Investigation and issuance of license
- 28- 7. License fees
- 28- 8. Renewal of licenses
- 28- 9. Personal license—fair employment practice
- 28-10. Emblem
- 28-11. License card
- 28-12. Insurance
- 28-13. Payment of judgments and awards
- 28-14. Suspension of license
- 28-15. Revocation of license
- 28-16. Interference with commissioner's duties
- 28-17. Front seat passenger
- 28-18. Notice
- 28-19. Livery vehicles
- 28-19.1. Taximeter prohibited
- 28-19.2. Solicitation of passengers prohibited
- 28-20. Livery advertising
- 28-21. Sightseeing vehicles
- 28-22. Taxicabs
- 28-22.1. Public convenience and necessity
- 28-23. Identification of taxicab and cabman
- 28-24. Taximeters
- 28-25. Taximeter inspection
- 28-26. Tampering with meters
- 28-27. Taximeter inspection fee
- 28-28. Taxicab service

* For amendments to former Chapter 28 prior to its revision on 12-20-51, see footnote at end of this chapter.

- 28-29. Group riding
- 28-29.1. Front seat passenger
- 28-30. Taxicab fares
- 28-31. Terminal vehicle
- 28-31.1. Public convenience and necessity
- 28-31.2. Local fares
- 28-32. Penalty

DEFINITIONS.

28-1. As used in this chapter:

"B~~us~~man" means a person engaged in business as proprietor of one or more sightseeing buses.

"Cabman" means a person engaged in business as proprietor of one or more taxicabs or livery vehicles.

"Chauffeur" means the driver of a public passenger vehicle licensed by the city of Chicago as a public chauffeur.

"City" means the city of Chicago.

"Coachman" means a person engaged in business as proprietor of one or more terminal vehicles.

"Commissioner" means the public vehicle license commissioner, or any other body or officer having supervision of public passenger vehicle operations in the city.

"Council" means the city council of the city of Chicago.

"Livery vehicle" means a public passenger vehicle for hire only at a charge or fare for each passenger per trip or for each vehicle per trip fixed by agreement in advance.

"Person" means a natural person, firm or corporation in his own capacity and not in a representative capacity, the personal pronoun being applicable to all such persons of any number or gender.

"Public passenger vehicle" means a motor vehicle, as defined in the Motor Vehicle Law of the State of Illinois, which is used for the transportation of passengers for hire, excepting those devoted exclusively for funeral use or in

operation of a metropolitan transit authority or public utility under the laws of Illinois.

"Sightseeing vehicle" means a public passenger vehicle for hire principally on sightseeing tours at a charge or fare per passenger for each tour fixed by agreement in advance or for hire otherwise at a charge for each vehicle per trip fixed by agreement in advance.

"Taxicab" means a public passenger vehicle for hire only at lawful rates of fare recorded and indicated by taximeter in operation when the vehicle is in use for transportation of any passenger.

"Taximeter" means any mechanical device which records and indicates a charge or fare measured by distance traveled, waiting time and extra passengers.

"Terminal vehicle" means a public passenger vehicle which is operated exclusively for the transportation of passengers from railroad terminal stations and steamship docks to points within the area defined in section 28-31.

[Passed, Com. J. 12-29-51, p. 1596; amend. 1-30-52, p. 1921; 12-30-52, p. 3905; 7-26-55, p. 897.]

LICENSE REQUIRED.

28-2. It is unlawful for any person other than a metropolitan transit authority or public utility to operate any vehicle, or for any such person who is the owner of any vehicle to permit it to be operated, on any public way for the transportation of passengers for hire from place to place within the corporate limits of the city, except on a funeral trip, unless it is licensed by the city as a public passenger vehicle.

It is unlawful for any person to hold himself out to the public by advertisement or otherwise as a busman, cabman or coachman or as one who provides or furnishes any kind of public passenger vehicle service unless he has one or

more public passenger vehicles licensed for the class of service offered; provided that any association or corporation which furnishes call service for transportation may advertise the class of service which may be rendered to its members or subscribers, as provided in this chapter, if it assumes the liability and furnishes the insurance as required by section 28-23. [Passed, Comm. J. 12-20-51, p. 1596; amend. 1-30-52, p. 1921; 12-30-52, p. 3905.]

INTERURBAN OPERATIONS.

28-3. Nothing in this chapter shall be construed to prohibit any public passenger vehicle from coming into the city to discharge passengers accepted for transportation outside the city. While such vehicle is in the city no person shall solicit passengers therefor and no roof light or other special light shall be used to indicate that the vehicle is vacant or subject to hire. A white card bearing the words "Not For Hire" printed in black letters not less than two inches in height shall be displayed on the windshield of the vehicle. Any person in control or possession of such vehicle who violates the provisions of this section shall be subject to arrest and fine of not less than fifty dollars nor more than two hundred dollars for each offense. [Passed, Comm. J. 12-20-51, p. 1596; amend. 1-30-52, p. 1921.]

INSPECTIONS.

28-4. No vehicle shall be licensed as a public passenger vehicle until it has been inspected under the direction of the commissioner and found to be in safe operating condition and to have adequate body and seating facilities which are clean and in good repair for the comfort and convenience of passengers. [Passed, Comm. J. 12-20-51, p. 1596; amend. 12-30-52, p. 3905.]

SPECIFICATIONS.

28-4.1. No vehicle shall be licensed as a livery vehicle or taxicab unless it has two doors on each side, and no vehicle having seating capacity for more than seven passengers shall be licensed as a public passenger vehicle unless it has at least three doors on each side or fixed aisle space for passage to doors. [Passed, Coun. J. 12-30-52; p. 3905.]

APPLICATION.

28-5. Application for public passenger vehicle licenses shall be made in writing signed and sworn to by the applicant upon forms provided by the commissioner. The application shall contain the full name and Chicago street address of the applicant, the manufacturer's name, model, length of time in use, horse power and seating capacity of the vehicle applicant will use if a license is issued, and the class of public passenger vehicle license requested. The commissioner shall cause each application to be stamped with the time and date of its receipt. The applicant shall submit a statement of his assets and liabilities with his application. [Passed, Coun. J. 12-20-51, p. 1596; amend. 1-30-52, p. 1921.]

INVESTIGATION AND ISSUANCE OF LICENSE.

28-6. Upon receipt of an application for a public passenger vehicle license the commissioner shall cause an investigation to be made of the character and reputation of the applicant as a law abiding citizen; the financial ability of the applicant to render safe and comfortable transportation service, to maintain or replace the equipment for such service and to pay all judgments and awards which may be rendered for any cause arising out of the operation of a public passenger vehicle during the license period. If

the commissioner shall find that the applicant is qualified and that the vehicle for which a license is applied for is in safe and proper condition as provided in this chapter, the commissioner shall issue a public passenger vehicle license to the owner of the vehicle for the license period ending on the thirty-first day of December following the date of its issuance, subject to payment of the public passenger vehicle license fee for the current year. [Passed. Coun. J. 12-20-51, p. 1596; amend. 4-16-52, p. 2178.]

LICENSE FEES.

28-7. The annual fee for each public passenger vehicle license of the class herein set forth is as follows:

Livery vehicle	\$ 25.00
Sightseeing vehicle	125.00
Taxicab	40.00
Terminal vehicle	25.00

Said fee shall be paid in advance when the license is issued and shall be applied to the cost of issuing such license; including, without being limited to, the investigations, inspections and supervision necessary therefor, and to the cost of regulating all operations of public passenger vehicles as provided in this chapter.

Nothing in this section shall affect the right of the city to impose or collect a vehicle tax and any occupational tax, as authorized by the laws of the state of Illinois, in addition to the license fee herein provided. [Passed. Coun. J. 12-20-51, p. 1596; amend. 12-30-52, p. 3905.]

RENEWAL OF LICENSES.

28-8. All licenses for public passenger vehicles issued for the year 1951, which have not been revoked or surrendered prior to the time when such licenses for the year 1952 shall have been issued, may be renewed from year to

year, subject to the provisions of this chapter. [Passed. Coun. J. 12-20-51, p. 1598; amend. 1-30-52, p. 1921.]

PERSONAL LICENSE—FAIR EMPLOYMENT PRACTICE.

28-9. No public passenger vehicle license shall be subject to voluntary assignment or transfer by operation of law, except in the event of the licensee's induction or recall into the armed forces of the United States for active duty or in the event of the licensee's death. In case of death the assignment shall be made by the legal representatives of his estate. No assignment shall be effective until the assignee shall have filed application for a license and is found to be qualified as provided in sections 28-5 and 28-6. If qualified the license shall be transferred to him by the commissioner, subject to payment of a transfer fee of \$50.00, the assumption by the assignee of all liabilities for loss or damage resulting from any occurrence arising out of or caused by the operation or use of the licensed public passenger vehicle before the effective date of the transfer and the approval by the commissioner of the insurance to be furnished by the busman, cabman or coachman as required by section 28-12.

It is unlawful for any busman, cabman or coachman to lease or loan a licensed public passenger vehicle for operation by any person for transportation of passengers for hire within the city. No person other than a chauffeur, who is either the busman, cabman or coachman or one hired by the busman, cabman or coachman to drive such vehicle as his agent or employee, in the manner prescribed by the busman, cabman or coachman, shall operate such vehicle for the transportation of passengers for hire within the city.

There shall be no discrimination by any busman, cabman or coachman against any person employed or seeking employment as a chauffeur with respect to hire, promotion,

tenure, terms, conditions and privileges of employment on account of race, color, religion, national origin or ancestry. [Passed. Coun. J. 12-20-51, p. 1596; amend. 1-30-52, p. 1921; 12-30-52, p. 3905.]

EMBLEM.

28-10. The commissioner shall deliver with each license a sticker license emblem which shall bear the words "Public Vehicle License" and "Chicago" and the numerals designating the year for which such license is issued, a reproduction of the corporate seal of the city, the names of the mayor and the commissioner and serial number identical with the number of the public vehicle license. The predominant back-ground colors of such sticker license emblems shall be different from the vehicle tax emblem for the same years and shall be changed annually. The busman, cabman or coachman shall affix, or cause to be affixed, said sticker emblem on the inside of the glass part of the windshield of said vehicle. [Passed. Coun. J. 12-20-51, p. 1596; amend. 12-30-52, p. 3905.]

LICENSE CARD.

28-11. In addition to the license and sticker emblem the commissioner shall deliver a license card for each vehicle. Said card shall contain the name of the busman, cabman or coachman, the license number of the vehicle and the date of inspection thereof. It shall be signed by the commissioner and shall contain blank spaces upon which entries of the date of every inspection of the vehicle and such other entries as may be required shall be made. It shall be of different color each year. A suitable frame with glass cover shall be provided and affixed on the inside of the vehicle in a conspicuous place and in such manner as may be determined by the commissioner for insertion and removal of

the public passenger vehicle license card; and in every livery vehicle and taxicab said frame shall also be provided for insertion and removal of the chauffeur's license card and such other notice as may be required by the provisions of this chapter and the rules of the commissioner. It is unlawful to carry any passenger or his baggage unless the license cards are exposed in the frame as provided in this section, [Passed, Com. J. 12-20-51, p. 1596; amend. 12-30-52, p. 3905.]

INSURANCE.

28-12. Every busman, cabman or coachman shall carry public liability and property damage insurance and workmen's compensation insurance for his employees with solvent and responsible insurers approved by the commissioner, authorized to transact such insurance business in the state of Illinois, and qualified to assume the risk for the amounts hereinafter set forth under the laws of Illinois, to secure payment of any loss or damage resulting from any occurrence arising out of or caused by the operation or use of any of the busman's, cabman's or coachman's public passenger vehicles.

The public liability insurance policy or contract may cover one or more public passenger vehicles, but each vehicle shall be insured for the sum of at least five thousand dollars for property damage and fifty thousand dollars for injuries to or death of any one person, and each vehicle having seating capacity for not more than seven adult passengers shall be insured for the sum of at least one hundred thousand dollars for injuries to or death of more than one person in any one accident. Each vehicle having seating capacity for more than seven adult passengers shall be insured for injuries to or death of more than one person in any one accident for at least five thousand dollars more for each such additional passenger capacity.

Every insurance policy or contract for such insurance shall provide for the payment and satisfaction of any final judgment rendered against the busman, cabman or coachman and person insured, or any person driving any insured vehicle, and that suit may be brought in any court of competent jurisdiction upon such policy or contract by any person having claims arising from the operation or use of such vehicle. It shall contain a description of each public passenger vehicle insured, manufacturer's name and number, the state license number and the public passenger vehicle license number.

In lieu of an insurance policy or contract a surety bond or bonds with a corporate surety or sureties authorized to do business under the laws of Illinois, may be accepted by the commissioner for all or any part of such insurance; provided that each bond shall be conditioned for the payment and satisfaction of any final judgment in conformity with the provisions of an insurance policy required by this section.

All insurance policies or contracts or surety bonds required by this section, or copies thereof certified by the insurers or sureties, shall be filed with the commissioner and no insurance or bond shall be subject to cancellation except on thirty days' previous notice to the commissioner. If any insurance or bond is cancelled or permitted to lapse for any reason, the commissioner shall suspend the license for the vehicle affected for a period not to exceed thirty days; to permit other insurance or bond to be supplied in compliance with the provisions of this section. If such other insurance or bond is not supplied, within the period of suspension of the license, the mayor shall revoke the license for such vehicle. [Passed. Comm. J. 12-20-51, 1596; amend. 1-30-52, p.1921; 12-30-52, p. 3905.]

PAYMENT OF JUDGMENTS AND AWARDS.

28-13. All judgments and awards rendered by any court or commission of competent jurisdiction for loss or damage in the operation or use of any public passenger vehicle shall be paid by the busman, cabman or coachman within ninety days after they shall become final and not stayed by supersedeas. This obligation is absolute and not contingent upon the collection of any indemnity from insurance. [Passed. Conn. J. 12-20-51, p. 1596 amend. 12-30-52, p. 3905.]

SUSPENSION OF LICENSE.

28-14. If any public passenger vehicle shall become unsafe for operation or if its body or seating facilities shall be so damaged, deteriorated or unclean as to render said vehicle unfit for public use, the license therefor shall be suspended by the commissioner until the vehicle shall be made safe for operation and its body shall be repaired and painted and its seating facilities shall be reconditioned or replaced as directed by the commissioner. In determining whether any public passenger vehicle is unfit for public use the commissioner shall give consideration to its effect on the health, comfort and convenience of passengers and its public appearance on the streets of the city.

Upon suspension of a license for any cause, under the provisions of this chapter, the license sticker emblem shall be removed by the commissioner from the windshield of the vehicle and an entry of the suspension shall be made on the license card. If the suspension is terminated an entry thereof shall be made on the license card by the commissioner and a duplicate license sticker shall be furnished by the commissioner for a fee of one dollar. The commissioner shall notify the department of police of every suspension and termination of suspension. [Passed. Conn. J. 12-20-51, p. 1596.]

REVOCATION OF LICENSE.

28-15. If any summons or subpoena issued by a court or commission cannot be served upon the busman, cabman or coachman at his last Chicago address recorded in the office of the commissioner within sixty days after such process is delivered to the person authorized to serve it, and the busman, cabman, or coachman fails to appear in answer to such process for want of service, or if any busman, cabman or coachman shall refuse or fail to pay any judgment or award as provided in section 28-13, or shall lease or loan any of his licensed public passenger vehicles for operation by any person for hire or shall be convicted of a felony or any criminal offense involving moral turpitude, the mayor shall revoke all public vehicle licenses held by him.

If any public passenger vehicle license was obtained by application in which any material fact was omitted or stated falsely, or if any public passenger vehicle is operated in violation of the provisions of this chapter for which revocation of the license is not mandatory, or if any public passenger vehicle is operated in violation of the rules and regulations of the commissioner relating to the administration and enforcement of the provisions of this chapter, the commissioner may recommend to the mayor that the public passenger vehicle license therefor be revoked and the mayor, in his discretion, may revoke said license.

Upon revocation of any license, the commissioner shall remove the license sticker emblem and the license card from the vehicle affected. [Passed, Coun. J. 12-20-51, p. 1596; amend. 1-30-52, p. 1921; 12-30-52, p. 3905.]

INTERFERENCE WITH COMMISSIONER'S DUTIES.

28-16. Every busman, cabman or coachman shall deliver or submit his public passenger vehicles for inspection or the performance of any other duty by the commissioner upon demand. It is unlawful for any person to interfere with or hinder or prevent the commissioner from discharging any duty in the enforcement of this chapter. [Passed, Coun. J. 12-20-51, p. 1596; amend. 12-30-52, p. 3905.]

FRONT SEAT PASSENGER.

28-17. It is unlawful to permit more than one passenger to occupy the front seat with the chauffeur in any public passenger vehicle. [Passed, Coun. J. 12-20-51, p. 1596.]

NOTICE.

28-18. It is the duty of every busman, cabman or coachman to notify the commissioner whenever any change in his Chicago address is made. Any notice required to be given to the busman, cabman or coachman shall be sufficient if addressed to the last Chicago address recorded in the office of the commissioner. [Passed, Coun. J. 12-20-51, p. 1596; amend. 12-30-52, p. 3905.]

LIVERY VEHICLES.

28-19. No person shall be qualified for a livery vehicle license and a taxicab license at the same time; nor shall any person having a livery vehicle license be associated with anyone for sending or receiving calls for taxicab service.

No license for any livery vehicle shall be issued except in the annual renewal of such license or upon transfer to permit replacement of a vehicle for that licensed unless,

after a public hearing, the commissioner shall determine that public convenience and necessity require additional livery service and shall recommend to the council the maximum number of such licenses to be authorized by ordinance.

Not more than six passengers shall be accepted for transportation in a livery vehicle on any trip. [Passed. Coun. J. 12-20-51, p. 1596; amend. 1-30-52, p. 1921.]

TAXIMETER PROHIBITED.

28-19.1. It is unlawful for any person to operate or drive a livery vehicle equipped with a meter which registers a charge or fare or indicates the distance traveled by which the charge or fare to be paid by a passenger is measured. [Passed. Coun. J. 1-30-52, p. 1921.]

SOLICITATION OF PASSENGERS PROHIBITED.

28-19.2. It is unlawful for any person to solicit passengers for transportation in a livery vehicle on any public way. No such vehicle shall be parked on any public way for a time longer than is reasonably necessary to accept passengers in answer to a call for service and no passengers shall be accepted for any trip in such vehicle without previous engagement for such trip, at a fixed charge or fare, through the station or office from which said vehicle is operated. [Passed. Coun. J. 1-30-52, p. 1921.]

LIVERY ADVERTISING.

28-20. It is unlawful for the cabman of any livery vehicle, or the station from which it is operated to use the word "taxi", "taxicab" or "cab" in connection with or as part of the name of the cabman or his trade name.

The outside of the body of each livery vehicle shall be

uniform black, blue or blue-black color. No light fixtures or lights shall be attached to or exposed so as to be visible outside of any livery vehicle, except such as are required by the law of the state of Illinois regulating traffic by motor vehicles and one rear red light in addition to those required by said law. No name, number or advertisement of any kind, excepting official license emblems or plates, shall be painted or carried so as to be visible outside of any livery vehicle.

It is unlawful for any person to hold himself out to the public by advertisement, or otherwise, to render any livery service unless he is the cabman of a licensed livery vehicle. [Passed. Coun. J. 12-20-51, p. 1596.]

SIGHTSEEING VEHICLES.

28-21. —Sightseeing vehicles shall not be used for transportation of passengers for hire except on sightseeing tours or chartered trips. Passengers for sightseeing tours shall not be solicited upon any public way except at bus stands specially designated by the council for sightseeing vehicles.

It is unlawful for any cabman or coachman to advertise his public passenger vehicle for hire on sightseeing tours. [Passed. Coun. J. 12-20-51, p. 1596; amend. 12-30-52, p. 3905.]

TAXICABS.

28-22. Every taxicab shall be operated regularly to the extent reasonably necessary to meet the public demand for service. If the service of any taxicab is discontinued for any reason except on account of strike, act of God or cause beyond the control of the cabman, the commissioner may give written notice to the cabman to restore the taxicab to service, and if it is not restored within five days after

notice, the commissioner may recommend to the mayor that the taxicab license be revoked and the mayor, in his discretion, may revoke same. [Passed. Coun. J. 12-20-51, p. 1596.]

PUBLIC CONVENIENCE AND NECESSITY.

28-22.1. Not more than 3761 taxicab licenses shall be issued unless, after a public hearing, the commissioner shall report to the council that public convenience and necessity require additional taxicab service and shall recommend the number of taxicab licenses which may be issued. Notice of such hearing stating the time and place thereof shall be published in the official newspaper of the city at least twenty days prior to the hearing and by mailing a copy thereof to all taxicab licensees. At such hearing any licensee, in person or by attorney, shall have the right to cross-examine witnesses and to introduce evidence pertinent to the subject. At any time and place fixed for such hearing it may be adjourned to another time and place without further notice.

In determining whether public convenience and necessity require additional taxicab service, due consideration shall be given to the following:

1. The public demand for taxicab service;
2. The effect of an increase in the number of taxicabs on the safety of existing vehicular and pedestrian traffic;
3. The effect of increased competition,
 - (a) on revenues of taxicab licensees;
 - (b) on cost of rendering taxicab service, including provisions for proper reserves and a fair return on investment in property devoted to such service;
 - (c) on the wages or compensation, hours and conditions of service of taxicab chauffeurs;

4. The effect of a reduction, if any, in the level of net revenues to taxicab licensees on reasonable rates of fare for taxicab service;
5. Any other facts which the commissioner may deem relevant.

If the commissioner shall report that public convenience and necessity require additional taxicab service, the council, by ordinance, may fix the maximum number of taxicab licenses to be issued, not to exceed the number recommended by the commissioner. [Passed. Coun. J. 1-30-52, p. 1921.]

IDENTIFICATION OF TAXICAB AND CABMAN.

28-23. Every taxicab shall have the cabman's name, telephone number and the public passenger vehicle license number plainly painted in plain Gothic letters and figures of three-eighth inch stroke and at least two inches in height in the center of the main panel of the rear doors of said vehicle. In lieu of the cabman's telephone number the name and telephone number of any corporation or association with which the cabman is affiliated may be painted in the same manner, provided such corporation or association shall have assumed equal liability with the cabman for any loss or damage resulting from any occurrence arising out of or caused by the operation or use of any of the cabman's taxicabs and shall carry and furnish to the commissioner public liability and property damage insurance to secure payment of such loss or damage as provided in section 28-12. The public vehicle license number assigned to any taxicab shall be assigned to the same vehicle or to any vehicle substituted therefor upon annual renewal of the license. No other name, number or advertisement of any kind, excepting signs required by this chapter, official license emblems or plates and a trade emblem, in a manner approved by the commissioner, shall

be painted or carried so as to be visible on the outside of any taxicab. [Passed. Coun. J. 12-20-51, p. 1596; amend. 1-30-52, p. 1921.]

TAXIMETERS.

28-24. Every taxicab shall be equipped with a taximeter connected with and operated from the transmission of the taxicab to which it is attached. The taximeter shall be equipped with a flag at least three inches by two inches in size. The flag shall be plainly visible from the street and shall be kept up when the taxicab is for hire and shall be kept down when it is engaged.

Taximeters shall have a dial or dials to register the tariff in accordance with the lawful rates and charges. The dial shall be in plain view of the passenger while riding and between sunset and sunrise the dial shall be lighted to enable the passenger to read it.

It is unlawful to operate a taxicab for hire within the city unless the taximeter attached thereto has been sealed by the commissioner. [Passed. Coun. J. 12-20-51, p. 1596; amend. 1-30-52, p. 1921.]

TAXIMETER INSPECTION.

28-25. At the time a taxicab license is issued and semi-annually thereafter the taximeter shall be inspected and tested by the commissioner to determine if it complies with the specifications of this chapter and accurately registers the lawful rates and charges. If it is in proper condition for use, the taximeter shall be sealed and a written certificate of inspection shall be issued by the commissioner to the cabman. Upon complaint by any person that a taximeter is out of working order or does not accurately register the lawful rates and charges it shall be again inspected and tested and, if found to be in improper working

condition or inaccurate, it shall be unlawful to operate the taxicab to which it is attached until it is equipped with a taximeter which has been inspected and tested by the commissioner, found to be in proper condition, sealed and a written certificate of inspection therefor is issued.

The cabman or person in control or possession of any taxicab shall deliver it with the taximeter attached or deliver the taximeter detached from the taxicab for inspection and test as requested by the commission. The cabman may be present or represented when such inspection and test is made. [Passed. Conn. J. 12-20-51, p. 1596.]

TAMPERING WITH METERS.

28-26. It is unlawful for any person to tamper with, mutilate or break any taximeter or the seal thereof or to transfer a taximeter from one taxicab to another for use in transportation of passengers for hire before delivery of the taxicab with a transferred taximeter for inspection test and certification by the commissioner as provided in section 28-25. [Passed. Conn. J. 12-20-51, p. 1596.]

TAXIMETER INSPECTION FEE.

28-27. The fee for each certificate of inspection shall be three dollars, but no charge shall be made for any certificate when the inspection and test is made upon complaint, and it is found that the taximeter is in proper working condition and accurately registers the lawful rates and charges. [Passed. Conn. J. 12-20-51, p. 1596.]

TAXICAB SERVICE.

28-28. It is unlawful to refuse any person transportation to any place within the city in any taxicab which is unoccupied by a passenger for hire unless it is on its way to pick up a passenger in answer to a call for service or it

is out of service for any other reason. When any taxicab is answering a call for service or is otherwise out of service it shall not be parked at a cabstand, and no roof light or other special light shall be used to indicate that the vehicle is vacant or subject to hire. A white card bearing the words "Not For Hire" printed in black letters not less than two inches in height shall be displayed on the windshield of such taxicab. [Passed. Conn. J. 12-20-51, p. 1596.]

GROUP RIDING.

28-29. Group riding is prohibited in taxicabs, except as directed by the passenger first engaging the taxicab. Not more than five passengers shall be accepted for transportation on any trip; provided that additional passenger, under twelve years of age accompanied by an adult passenger shall be accepted if the taxicab has seating capacity for them. [Passed. Conn. J. 12-20-51, p. 1596.]

FRONT SEAT PASSENGER.

28-29.1. No passenger shall be permitted to ride on the front seat with the chauffeur of the taxicab unless all other seats are occupied. [Passed. Conn. J. 12-20-51, p. 1596.]

TAXICAB FARES.

28-30. Rates of fare for taxicabs shall be as follows:

For the first one-quarter of a mile or fraction thereof for one person..... 35 cents

For each additional one-half of a mile or fraction thereof for one person..... 10 cents

For each additional person of twelve years or more for the whole trip..... 10 cents

For each three minutes of waiting time or fraction thereof 10 cents

Waiting time shall include the time beginning three minutes after call time at the place to which the taxicab has

been called when it is not in motion, the time consumed by unavoidable delays at street intersections, bridges or elsewhere and the time consumed while standing at the direction of a passenger.

Every passenger under twelve years of age when accompanied by an adult shall be carried without charge.

Ordinary hand baggage of passengers shall be carried without charge. A fee of twenty-five cents may be charged for carrying a trunk, but no trunk shall be carried except inside of the taxicab.

Immediately on arrival at the passenger's destination it shall be the duty of the chauffeur to throw the taximeter lever to the non-recording position and to call the passenger's attention to the fare registered.

It is unlawful for any person to demand or collect any fare for taxicab service which is more or less than the rates established by the foregoing schedule, or for any passenger to refuse payment of the fare so registered. [Passed. Coun. J. 12-20-51, p. 1596; amend. 1-30-52, p. 1921; 11-16-53, p. 6085.]

TERMINAL VEHICLES.

28-31. *Terminal vehicles shall not be used for transportation of passengers for hire except from railroad terminal stations and steamship docks to destinations in the area bounded on the north by E. and W. Ohio street; on the west by N. and S. Desplaines street; on the south by E. and W. Roosevelt road; and on the east by Lake Michigan.* [Passed. Coun. J. 12-20-51, p. 1596; amend. 1-30-52, p. 1921; 12-30-52, p. 3905; 7-26-55, p. 897.]

PUBLIC CONVENIENCE AND NECESSITY.

28-31.1. *No license for any terminal vehicle shall be issued except in the annual renewal of such license or upon*

transfer to permit replacement of a vehicle for that licensed unless, after a public hearing held in the same manner as specified for hearings in section 28-22.1, the commissioner shall report to the council that public convenience and necessity require additional terminal vehicle service and shall recommend the number of such vehicle licenses which may be issued.

In determining whether public convenience and necessity require additional terminal vehicle service due consideration shall be given to the following:

1. The public demand for such service;
2. The effect of an increase in the number of such vehicles on the safety of existing vehicular and pedestrian traffic in the area of their operation;
3. The effect of an increase in the number of such vehicles upon the ability of the licensee to continue rendering the required service at reasonable fares and charges to provide revenue sufficient to pay for all costs of such service, including fair and equitable wages and compensation for licensee's employees and a fair return on the investment in property devoted to such service;
4. Any other facts which the commissioner may deem relevant.

If the commissioner shall report that public convenience and necessity require additional terminal vehicle service, the council, by ordinance, may fix the maximum number of terminal vehicle licenses to be issued not to exceed the number recommended by the commissioner. [Passed: Comm. J. 7-26-55, p. 897.]

LOCAL FARES.

28-31.2. The rate of fare for local transportation of every passenger in terminal vehicles of the licensee shall be uniform, regardless of the distance traveled; provided

that children under 12 years of age, when accompanied by an adult, shall be carried at not more than half fare. Such rates of fare shall be posted in a conspicuous place or places within each vehicle as determined by the commissioner. [Passed. Conn. J. 7-26-55, p. 897.]

PENALTY.

28-32. Any person violating any provision of this chapter for which a penalty is not otherwise provided shall be fined not less than \$5.00 nor more than \$100.00 for the first offense, not less than \$25.00 nor more than \$100.00 for the second offense during the same calendar year, and not less than \$50.00 nor more than \$100.00 for the third and succeeding offenses during the same calendar year, and each day that such violation shall continue shall be deemed a separate and distinct offense. [Passed. Conn. J. 12-20-51, p. 1596.]

NOTE: The following list covers amendments prior to 12-20-51 to former Chapter 28, revised 12-28-45, p. 4689:

- 28-4. 2-6-48, p. 1918; 3-1-48, p. 1983.
- 28-8. 2-28-46, p. 5167; 2-5-47, p. 7249; 2-6-48, p. 1918.
- 28-18. 2-28-46, p. 5167; 2-5-47, p. 7249; 2-6-48, p. 1918.
- 28-19. 2-6-48, p. 1918; 3-1-48, p. 1983; 12-29-50, p. 7622.
- 28-29. 9-29-48, p. 2978.
- 28-35. 8-21-41, p. 5457; 10-27-43, p. 803; 12-28-44, p. 2626.
- 28-36. 10-27-43, p. 803.
- 28-38. 8-21-41, p. 5457.

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APPENDIX B.

IN THE UNITED STATES COURT OF APPEALS,
For the Seventh Circuit.

No. 11692 SEPTEMBER TERM, 1956, SEPTEMBER SESSION, 1956.

THE ATCHISON, TOPEKA AND SANTA
FE RAILWAY COMPANY, et al.,

Plaintiffs-Appellants,

v.

CITY OF CHICAGO, a municipal cor-
poration, et al.,

Defendants-Appellees,

and

PARMELEE TRANSPORTATION COM-
PANY,

Defendant-Intervenor-Appellee.

Appeal from the
United States Dis-
trict Court for the
Northern District
of Illinois, Eastern
Division.

January 17, 1957

Before MAJOR, SWAIM and SCHNACKENBERG, *Circuit
Judges.*

SCHNACKENBERG, *Circuit Judge.* Twenty-one railroads.

1. The Atchison, Topeka and Santa Fe Railway Company; The Baltimore and Ohio Railroad Company; The Chesapeake and Ohio Railway Company; Chicago, Burlington & Quincy Railroad Company; Chicago & Eastern Illinois Railroad Company; Chicago Great Western Railway Company; Chicago, Indianapolis and Louisville Railway Company; Chicago, Milwaukee, St. Paul & Pacific Railroad Company; Chicago North Shore and Milwaukee Railway; Chicago and North Western Railway Company; Chicago, Rock Island & Pacific Railroad Company; Chicago South Shore and South Bend Railroad; Erie Railroad Company; Grand Trunk Western Railroad Company; Gulf, Mobile and Ohio Rail-

herein sometimes referred to as Terminal Lines, and Railroad Transfer Service, Inc., sometimes herein referred to as Transfer, on October 24, 1955 brought an action in the district court against defendant City of Chicago, sometimes herein referred to as the city, and certain officials thereof.² Plaintiffs' complaint seeks a declaratory judgment and injunctive relief against the enforcement against them of an ordinance known as chapter 28 of the municipal code of Chicago, as amended by an ordinance enacted July 26, 1955. Plaintiffs asked the district court to declare by its judgment, *inter alia*, that the ordinance, as amended in 1955, is void as applied to them.

Parmelee Transportation Company, sometimes herein referred to as Parmelee, on its petition was granted leave to intervene as a defendant.³

On motion of defendants, other than Parmelee, pursuant to rule 56 of the federal rules of civil procedure,⁴ and on the pleadings, affidavits and exhibits submitted by all parties, the district court on January 12, 1956 granted a summary judgment against plaintiffs and dismissed their action.⁵ 136 F. Supp. 476. From said judgment this appeal was taken.⁶

road Company; Illinois Central Railroad Company; Minneapolis, St. Paul & Sault Ste. Marie Railroad Company; The New York Central Railroad Company; The New York, Chicago and St. Louis Railroad Company; The Pennsylvania Railroad Company; and the Wabash Railroad Company.

2. Richard J. Daley, as mayor; John C. Melaniphy, as acting corporation counsel; Timothy P. O'Connor, as commissioner of police; and William P. Flynn, as public license commissioner.

3. The district court considered the petition as an answer to the complaint.

4. Fed. Rules of Civil Procedure, rule 56, 28 U. S. C. A.

5. On the same day the district court filed "findings of fact" and "conclusions of law", one conclusion being that there is no genuine issue of fact involved in this controversy.

6. On January 13, 1956 the district court ordered that defendants, other than Parmelee, be enjoined from enforcing the ordi-

The undisputed facts we now set forth.

There are eight passenger terminals in downtown Chicago, each being used by from one to six railroads. No one railroad passes through Chicago, but about 3900 railroad passengers daily travel through Chicago on continuous journeys which begin and end at points outside Chicago. At Chicago, they transfer from an incoming, to an outgoing, railroad. The only practical method of transferring these passengers between the different terminal stations is by motor vehicle equipped to carry them and their hand baggage simultaneously. More than 99 per cent of the passengers so transferred between terminal stations are traveling on through tickets between points of origin and destination located in different states. They are carried over public ways of the city.

Transfer began its operations on October 1, 1955, but has not applied to the city for public passenger terminal vehicle licenses. These transfer operations are required by a tariff filed with the Interstate Commerce Commission. They have been provided for by tariffs for more than the past forty years.

Pursuant to such tariffs a passenger traveling through
 nance in question against plaintiffs upon the latter filing supersedeas bond of \$50,000. It is our understanding that this bond was filed.

7. Local and Joint Passenger Tariff No. 3 governing, *inter alia*, passengers and baggage transfer between stations in Chicago, was filed with the Interstate Commerce Commission on behalf of Terminal Lines. On page 11 of said tariff, in Section 2 thereof, the Terminal Lines are listed according to the Chicago stations which they enter and it is set forth in Section 2 thereof that transfer is required between all railroad stations when transfer is necessary, and in Column 4 appears "Passenger transfer included" while in Column 5 there appears "Transfer of all baggage included".

Page 5 of said tariff in Section 4 thereof provides in rule 4, in part, as follows:

"Through Transportation. (a) Where it is designated in Column 4, Section 2, that passenger transfer is included,

Chicago purchases at his point of origin a railroad ticket composed of a series of coupons covering his complete transportation to his destination. If his through journey requires him to transfer from one railroad passenger terminal in Chicago to another, a part of his ticket consists of a coupon good for the transfer of himself and his hand baggage between such terminals. The expense of the required transfer service is absorbed by the railroads.

The tariffs provide that any such required transfer service shall be without additional charge where a one-way fare from Chicago to destination would be more than a specified minimum sum. Where such fare would be less than such minimum, a fixed charge which varies with the fare must be added to cover the required transfer service.

Prior to October 1, 1955, there had existed for many years arrangements between the Terminal Lines and Parmelee whereby it furnished this service for coupon-holding passengers. On June 13, 1955, the Terminal Lines ended their arrangement with Parmelee effective September 30, 1955. Under date of October 1, 1955, the Terminal Lines and Transfer executed a contract. In brief, this contract provides that, upon delivery of a transfer coupon to Transfer by a through-passenger, it will carry him and his hand baggage from the incoming to the appropriate outgoing station without charge. Transfer is compensated by the outgoing terminal railroad. Transfer is given the exclusive

transfer coupon must be included in through ticket without additional collection.

And rule 6 in Section 1, in part, provides:

"Through Transportation. (a) Where it is designated in Column 5, Section 2, that baggage transfer is included, baggage may be checked through without additional collection."

8. On or about September 19, 1955, the railroads filed copies of the contract with the Interstate Commerce Commission and with the Illinois Commerce Commission.

right to perform this transfer service. Transfer devotes its vehicles exclusively to service under the contract.

On and prior to June 13, 1955, there was in effect an ordinance of the city, being said chapter 28 of the municipal code, consisting of sections 28-1 to 28-32,¹⁰ for the regulation of "Public Passenger Vehicles." Section 28-1 contained the following definitions, *inter alia*:

"'Public passenger vehicle' means a motor vehicle, as defined in the Motor Vehicle Law of the State of Illinois, which is used for the transportation of passengers for hire, excepting those devoted exclusively for funeral use or in operation of a metropolitan transit authority or public utility under the laws of Illinois."

"'Terminal vehicle' means a public passenger vehicle which is operated under contracts with railroad and steamship companies, exclusively for the transfer of passengers from terminal stations."

Section 28-31 provided:

"28-31. No person shall be qualified for a terminal vehicle license unless he has a contract with one or more railroad or steamship companies for the transportation of their passengers from terminal stations.

"It is unlawful to operate a terminal vehicle for the transportation of passengers for hire except for their transfer from terminal stations to destinations in the area bounded on the north by E. and W. Ohio Street; on the west by N. and S. Desplaines Street; on the south by E. and W. Roosevelt Road; and on the east by Lake Michigan."

9. The contract also provides that Transfer shall perform certain additional baggage transfer services for Terminal Lines. The transfer of a passenger's *checked* baggage by Transfer in vehicles other than "terminal vehicles", although covered by terms of the contract between Terminal Lines and Transfer, as well as actually performed by Parmelee prior to October 1, 1955, is not involved in this case.

10. Herein sometimes referred to as the prior ordinance.

Certain other parts of chapter 28 incorporated regulations enacted pursuant to the police power of the city.⁴¹

Parmelee was, on and prior to September 30, 1955, the only person having a transfer contract with the Terminal Lines and licensed to operate terminal vehicles under the ordinance.

At a meeting of the committee on local transportation of the Chicago city council held on July 21, 1955, the chairman stated that recently he had been advised by the Vehicle License Commissioner that he had received a communication from Parmelee advising that its contract with the railroads was to be canceled out in September of that year, "which would make it appear that the railroads were taking the position of dictating who would or could operate terminal vehicles in Chicago; that he did not think that was right and had prepared an ordinance with the assistance of Mr. Gross, and had it introduced in the city council and referred it to the committee; that subsequently he had discussed said ordinance with Mr. Grossman of the corporation counsel's office and that, as a result of his conference with Mr. Grossman, it would appear that, while he was on the right track in the matter, his method of approach was wrong."

Mr. Grossman informed the committee that he had looked over the ordinance "as introduced" by the chairman and was of the opinion that it was not in proper form; but that he believed the objective could be obtained

11. These are provisions for granting and suspension of licenses, safety regulations based on the type of vehicle, number of passengers permitted, condition and maintenance of vehicles, inspection thereof, etc., financial responsibility of operators, investigation of character of prospective licensees and continuing supervision thereof, requirements for maintenance of adequate insurance, determination of public convenience and necessity with respect to number of certain intrastate vehicles, i.e. livery and taxicabs, which are to be permitted on the city streets, and regulation of taxi fares through meters.

in some other way. He said he would endeavor to prepare and submit an ordinance on this subject.

The chairman's proposed ordinance, which met with Mr. Grossman's objection as to form, and which was laid aside, in brief would have granted an exclusive franchise for ten years to Parmelee for the operation of terminal vehicles to transfer passengers and their baggage between railroad stations.¹²

On July 26, 1955, the chairman stated that the committee was in session to receive a report from Mr. Grossman who had prepared a substitute ordinance which would accomplish what the committee had in mind, namely, placing the licensing and operation of terminal vehicles under the complete control of the city of Chicago, whereas, as the code then provided, the only one who could secure a license for the operation of a terminal vehicle was someone who had a contract with the railroads.

On recommendation of the committee, the council on the same day passed the ordinance now under attack.¹³

1. The city and Parmelee concede that Transfer is engaged in interstate commerce. In *United States v. Yellow Cab Co.*, 332 U. S. 218, 228, Parmelee's operation (including that part now being carried on by Transfer) was held to be an integral step in an interstate movement and,

12. §2 read: "Subject to all the conditions of this ordinance, exclusive permission and authority is hereby granted to the licensee to operate terminal vehicles in the City for a period of ten (10) years, commencing on 1955, and ending on 1965."

§4 provided: "It is unlawful for any person to be an operator of one or more terminal vehicles on any public way from place to place within the corporate limits of the city unless such terminal vehicles are licensed by the City as terminal vehicles. * * *"

§11 provided: "Upon the effective date of this ordinance, the commissioner shall issue licenses hereunder to licensee in not to exceed the number of licenses held by such licensee on April 1, 1955. * * *"

13. Herein sometimes referred to as the 1955 ordinance.

therefore, a constituent part of interstate commerce.¹⁴ The court pointed out that Chicago is the terminus of a large number of railroads engaged in interstate passenger traffic and that a great majority of the persons making interstate railroad trips which carry them through Chicago must disembark from a train at one railroad station, travel from that station to another some two blocks to two miles distant, and board another train at the latter station; that Parmelee had contracted with the railroads to provide this transportation by special cabs carrying seven to ten passengers. The court said that Parmelee's contracts were exclusive in nature, adding:

"The transportation of such passengers and their luggage between stations in Chicago is clearly a part of the stream of interstate commerce. When persons or goods move from a point of origin in one state to a point of destination in another, the fact that a part of that journey consists of transportation by an independent agency solely within the boundaries of one state does not make that portion of the trip any less interstate in character. *The Daniel Ball*, 10 Wall. 557, 565. That portion must be viewed in its relation to the entire journey rather than in isolation. So viewed, it is an integral step in the interstate movement. See *Stafford v. Wallace*, 258 U. S. 495.

"Any attempt to monopolize or to impose an undue restraint on such a constituent part of interstate commerce brings the Sherman Act into operation." * * *

Obviously these holdings conform with the following well-established principles: (1) a state may not obstruct or lay a direct burden on the privilege of engaging in interstate commerce, *Furst v. Brewster*, 282 U. S. 493, 498; *Mich. Com. v. Duke*, 266 U. S. 570, 577, 69 L. ed. 445; but

14. The destination intended by the passenger when he begins his journey and known to the carrier, determines the character of the commerce, whether interstate or not. *Sprout v. South Bend*, 277 U. S. 163, 168.

(2) nevertheless, it may incidentally and indirectly affect it by a bona fide, legitimate, and reasonable exercise of its police power. 15 C.J.S. 266. In *Dahake-Walker Co. v. Boudurant*, 257 U.S. 282, 290, the court said:

"The commerce clause of the Constitution, Art. I, §8, cl. 3, expressly commits to Congress and impliedly withholds from the several States the power to regulate commerce among the latter. Such commerce is not confined to transportation from one State to another, but comprehends all commercial intercourse between different States and all the component parts of that intercourse."

The power here referred to may be exercised, not only in an act of Congress, but also in a regulation by the Interstate Commerce Commission. 15 C.J.S. 274.

Part I of the Interstate Commerce Act¹⁵ deals with railroads as well as other subjects not relevant here. §3 (3) thereof, in its presently pertinent provisions, appeared in the original act of February 4, 1887.¹⁶ It provides that all carriers of passengers subject to the act shall afford all reasonable facilities for the interchange of traffic between their respective lines and for the receiving, forwarding and delivering of passengers to and from connecting lines.¹⁷ *Central Transfer Co. v. Terminal R. R.*, 288 U.S. 469, 473, note 1.

Part II of the same act¹⁸ deals with motor carriers. As amended in 1940, §202(c)¹⁹ provides as follows:

§202(c) "Notwithstanding any provision of this

15. 49 U.S.C.A. §§1-27.

16. §3, second unnumbered paragraph, 24 Stat. 380.

17. There is no warrant for limiting the meaning of "connecting lines" to those having a direct physical connection. The term is commonly used as referring to all the lines making up a through route. *Atlantic Coast Line R. Co. v. U. S.*, 284 U.S. 288, 293.

18. 49 U.S.C.A. §§301-327. (1951 ed.).

19. 56 Stat. 300, where this section is known as section 202(c).

section or of section 203, the provisions of this part, [Part II], except the provisions of section 204 relative to qualifications and maximum hours of service of employees and safety of operation and equipment, shall not apply—

“(1) to transportation by motor vehicle by a carrier by railroad subject to part I, * * * incidental to transportation or service subject * * * [thereto] in the performance within terminal areas of transfer, collection, or delivery services; but such transportation shall be considered to be and shall be regulated as transportation subject to part I when performed by such carrier by railroad * * *;

“(2) to transportation by motor vehicle by any person (whether as agent or under a contractual arrangement) for a common carrier by railroad subject to part I, * * * in the performance within terminal areas of transfer, collection, or delivery service; but such transportation shall be considered to be performed by such carrier * * * as part of, and shall be regulated in the same manner as, the transportation by railroad, * * * to which such services are incidental.”

In Part I, §6(1) of the Interstate Commerce Act²⁰ requires every common carrier to file with the commission tariffs (therein referred to as schedules), for transportation, including joint rates over through routes. In this respect a tariff is to be treated the same as a statute. *Pennsylvania R. Co. v. International Coal Min. Co.*, 230 U. S. 183, at 197, 57 L. ed. 1446, 1451.

Relevant tariffs were filed with the Interstate Commerce Commission on behalf of the Terminal Lines.

The agreement of October 1, 1955²¹ obligates Transfer to perform all the required passenger and hand baggage

20. 49 U. S. C. A. §6(1).

21. The Baltimore and Ohio Chicago Terminal Railroad Company, Chicago and Western Indiana Railroad Company and Chicago Union Station Company, therein referred to as “depot companies”, are also parties to said agreement. That fact is not controlling in the decision of this case.

transfer service from the terminal station in Chicago of each incoming line to the terminal station in Chicago of each outgoing line, all at the expense of the latter, for the period beginning October 1, 1955 and ending September 30, 1960. This service (which has been since October 1, 1955 performed by Transfer) replaced the Parmelee service, with the exception of two types of operations local in their nature,²² consisting of (a) transportation of friends or relatives accompanying a coupon holder between stations, and (b) transportation of a coupon holder to any hotel or other terminus "in the loop district of Chicago", as requested of the driver by the coupon holder.

2. We conclude that Transfer is an instrumentality used by Terminal Lines in interstate commerce and is subject to control of the federal government. We also conclude that the city can neither give nor take away such authority of Transfer to operate and that the city has no power of control over Transfer, except the control which it has generally in exercising its police power pertaining to such matters as public safety, maintenance of streets and the convenient operation of traffic. For a more detailed statement of the scope of such police power, see *Continental Bakery Co. v. Woodring*, 286 U. S. 352.

This is not a case in which a motor vehicle operator is denied the privilege of operating on a particular highway because of the congestion of traffic thereon, such as was true in *Bradley v. Public Utility Commission*, 289 U. S. 92, (on which, for some reason not clear to us, the city relies), but rather we have a case where an ordinance, in effect, bars Transfer from the entire network of highways within the downtown area of Chicago.

Pursuant to federal law, Terminal Lines have assumed an obligation to furnish the service in question as an interstation link in interstate commerce. The integration of

22. See *Status of Parmelee Transp. Co.*, 288 I. C. C. 95, at 100.

this service with the complex, and occasionally changing, schedules of the Terminal Lines and the ebb and flow of passenger traffic existing in the various stations, requires a continuing and intimate knowledge thereof, which the Terminal Lines possess. The city is not equipped to function effectively in this area. It follows that the choice as to the instrumentality to be used for that purpose properly belongs to the Terminal Lines. These facts preclude the selection of an operator of terminal vehicles by anyone other than the Terminal Lines. While the city has power to regulate the operation of terminal vehicles incidently to its regulation of street traffic generally, it has no power, directly or indirectly, to designate who shall own or operate such vehicles. The prior ordinance recognized this situation. It was limited to terminal vehicles having contracts with the Terminal Lines and, as to which vehicles, it exercised certain police powers of the city relating to traffic regulation. That ordinance made no attempt, and it was not intended, to select the operator of the service. In contrast, the 1955 ordinance consists of provisions which, in effect, name Parmelee as the exclusive operator of terminal vehicles in Chicago even though it has no contract with the Terminal Lines which are under a federally imposed obligation to furnish this terminal facility. Each of the Terminal Lines, which sells through tickets calling for interstate transportation in Chicago, thereby assumes an individual obligation to the passenger to furnish that service. Yet, under the 1955 ordinance, that railroad would have no direct control over the operator of that service and no opportunity to protect itself by an agreement indemnifying it from claims of passengers for damages arising out of the negligence of the operator. Other obvious considerations point to the practical necessity of a continuing control by the Terminal Lines of the instrumentality furnishing the service covered by the coupons sold by those lines to interstate passengers.

3. However, the city contends that the 1955 ordinance not only retains the police regulations of the prior ordinance, but demonstrates the city's concern with all passenger vehicles for hire, and specifically with the effect of the number of taxicabs as well as terminal vehicles on the safety of existing vehicular and pedestrian traffic. The city contends that in this respect the ordinance is valid as an exercise of the police power.

But the Terminal Lines argue that the 1955 ordinance was adopted for the sole and evident purpose, not of police power regulation, but of economic regulation. They say that, not only would the 1955 ordinance add nothing in respect to police power regulations that were not contained in the prior ordinance, but that the 1955 ordinance added "elaborate requirements for proof of public convenience and necessity and other elements of economic regulation of interstate commerce * * *." They add "that these new economic regulations would apply to all except Parmelee; Parmelee was granted a perpetual franchise free from these requirements. The amendment eliminated the requirement that no one could obtain a license unless he had a contract for interstation transfer with the railroads. The amendment unmistakably marked the ordinance as an economic regulation not within the city's power."

Significant is §28-31.1 of the 1955 ordinance which provides that no license for any terminal vehicle shall be issued except in the annual renewal of such license or upon transfer to permit replacement of a vehicle for that licensed, unless, after a public hearing, the commissioner shall report to the council that public convenience and necessity require additional terminal vehicle service and shall recommend the number of such vehicle licenses which may be issued. It is further provided that, in determining whether public convenience and necessity require such additional service, the following, *inter alia*, shall be con-

sidered: "2. The effect of an increase in the number of such vehicles on the safety of existing vehicular and pedestrian traffic in the area of their operation; * * *"

Terminal Lines argue that these are the only provisions of the 1955 ordinance which could even appear to relate to public safety. But they aver that, as a purported safety measure, this is sham and spurious.

To us it appears that the cost of maintaining the terminal vehicle service, which is initially borne by Transfer and ultimately, to the extent of coupons issued and used, by the individual Terminal Lines, will operate effectively as an economic brake upon any unjustified increase in the number of such vehicles. Moreover, if and when a greater number is demanded by the growth of interstate passenger traffic, the city would then have no right, in the guise of an exercise of its police power, to cripple interstate commerce by preventing a justifiable increase in the number of such vehicles required to meet the needs of that commerce.

We are thus led to conclude that there is no valid legal basis for the above-cited provisions of §28-31.1 of the 1955 ordinance. We are convinced that those provisions, which would in effect limit the number of terminal vehicle licenses to those held by Parmelee on July 26, 1955 and give Parmelee perpetual control thereof, constitute a designation of Parmelee by the council of the city, in lieu of Transfer, the instrumentality selected by the Terminal Lines, rather than an exercise of the city's police power over traffic. In this critical aspect the 1955 ordinance is invalid. If there were any doubt that this conclusion is correct, the legislative history of the ordinance dispels that doubt.

At meetings of the committee which recommended the 1955 ordinance for passage, the committee chairman made it clear that the objective sought was the assumption by

the city of the authority to designate the instrumentality which was to operate terminal vehicles between railroad stations in Chicago. The proceedings of the committee fail to indicate that the chairman or any member of the committee was interested in traffic regulations or any other aspect of the city's police power.

In attempting to justify the 1955 ordinance, which admittedly retained police regulations contained in the prior ordinance, the city points to photographs of two transfer vehicles which, the city says, do not comply with retained §28-4.1, which provides that no vehicle having a seating capacity for more than 7 passengers shall be licensed as a public passenger vehicle unless at least 3 doors on each side or a fixed aisle space is provided, and retained §28-17, which provides that it is unlawful to permit more than one passenger to occupy the front seat with the chauffeur. There is no indication in the record that any terminal vehicles used by Transfer, except the two appearing in the photographs, violate §28-4.1. Even if §28-4.1 and §28-17 are violated, that fact does not empower the city to bar, or even suspend, the operations of Transfer. *Castle v. Hayes Freight Lines*, 348 U. S. 61. The fact that Hayes was operating trucks under a federal certificate of convenience and necessity, under Part II of the Interstate Commerce Act,²³ does not distinguish that case in principle from the present case in which Transfer is engaged in a federally authorized activity. See 49 U.S.C.A. §302(c)(2), *supra*. If Transfer's vehicles do not conform to the requirements contained in the prior ordinance,²⁴ the city may refuse to issue licenses for the non-conforming vehicles and penalize their unlicensed opera-

23. 49 U. S. C. A. §301, *et seq.*

24. Ch. 28, Chicago Municipal Code.

tion in accord with §28-32. So, also, whenever Transfer is found guilty of violating §28-17 the city may proceed against it according to the penalties section.²⁵

Undoubtedly the city has power to require that one engaged exclusively in interstate commerce may be required to procure from the city a license granting permission to use its highways and in addition pay a license fee demanded of all persons using automobiles on its highways as a tax for the maintenance of the highways and the administration of the laws governing the same. Highways being public property, users of them, although engaged exclusively in interstate commerce, are subject to regulation by the state or municipality to ensure safety and convenience and the conservation of the highways. Users of them, although engaged exclusively in interstate commerce, may be required to contribute to their cost and upkeep. Common carriers for hire, who make the highways their place of business, may properly be charged a tax for such use. *Clark v. Poor*, 274 U.S. 554, 557.

Both the language of the 1955 ordinance and its legislative history point to the fact that it is not legislation governing the manner of conducting a business or providing for a contribution toward the expense of highway maintenance, but that it requires a license, the granting of which, in turn, is made dependent upon the consent of the city to the prosecution of a business. This is not a valid requirement. See *Sault Ste. Marie v. International Transit Company*, 234 U.S. 333, 340, 58 L. ed. 1337, 1340.

As we have seen, the 1955 ordinance eliminated from

25. §28-32. "Any person violating any provision of this chapter for which a penalty is not otherwise provided shall be fined, not less than \$5.00 nor more than \$100.00 for the first offense, not less than \$25.00 nor more than \$100.00 for the second offense during the same calendar year, and not less than \$50.00 nor more than \$100.00 for the third and succeeding offenses during the same calendar year and each day the ~~same~~ violation shall continue shall be deemed a separate and distinct offense."

§28-1 of the prior ordinance a requirement that a terminal vehicle must be operated under contracts with railroad and steamship companies, and, by a new section, §28-31.1, in effect permitted Parmelee's existing terminal vehicle licenses to become perpetual by means of annual renewal or by transfer to a replacement vehicle, and also provided, in effect, that Transfer could not obtain any terminal vehicle license unless it proved to the satisfaction of the public vehicle license commissioner "that public convenience and necessity shall require additional terminal vehicle service".

In *Buck v. Kuykendall*, 267 U.S. 307, it appears that Buck wished to operate an autostage line as a common carrier for hire for through interstate passengers, over a public highway in the state of Washington. Having complied with the state laws relating to motor vehicles and owners and drivers, and alleging willingness to comply with all applicable regulations concerning common carriers, Buck applied to the state for a prescribed certificate of public convenience and necessity. It was refused on the ground, that the territory involved was already being adequately served by the holder of a certificate and that adequate transportation facilities were already being provided by four connecting autostage lines, all of which held such certificates from the state. The state relied upon its statute which prohibited common carriers for hire from using the highways by auto vehicles between fixed termini, or over regular routes, without having first obtained from the state a certificate of public convenience and necessity. Speaking of that statute, the court said, at 315:

" * * * Its primary purpose is not regulation with a view to safety or to conservation of the highways, but the prohibition of competition. It determines not the manner of use, but the persons by whom the highways

may be used. It prohibits such use to some persons while permitting it to others for the same purpose and in the same manner. * * * Thus, the provision of the Washington statute is a regulation, not of the use of its own highways, but of interstate commerce. Its effect upon such commerce is not merely to burden but to obstruct it. Such state action is forbidden by the Commerce Clause. * * *

To the same effect is *Mayor of Vidalia v. McNeely*, 274 U. S. 676, at 683.²⁶

4. We hold that it was unnecessary for Transfer to apply for licenses under the 1955 ordinance, because the issuance thereof unlawfully required a consent by the city to the prosecution of Transfer's business and was not merely a step in the regulation thereof. Being unnecessary, the relief prayed for herein may be granted without a showing that such application had been made before this suit was filed.

For the reasons hereinbefore set forth, the judgment of the district court is reversed and this cause is remanded to that court for further proceedings not inconsistent with the views herein set forth.

REVERSED AND REMANDED.

26. Both sides in the case at bar rely on *Columbia Terminals Co. v. Lambert*, 30 F. Supp. 28, appeal dismissed, 309 U. S. 620. The court there said that the question whether the state could demand that Columbia Terminals prove that its interstate commerce transfer operation would benefit the state, in order to obtain a state permit therefor, was not before it, because the state expressly admitted it lacked such power and made no such demand. The court said, at 31:

"Since this statute applies to interstate as well as intrastate contract haulers, if the complaint alleged or the evidence disclosed such action on the part of the State Commission, plaintiff would be entitled to relief from such action on the part of the state officials. * * * But when the State * * * undertakes to exercise the right to say what interstate commerce will benefit the State and what will not, such action, with certain exceptions immaterial here, constitutes an unconstitutional violation of the commerce clause."

While this is dictum, it is in accord with our holding herein.

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MAY 24 1956

JOHN T. FEY, Clerk

IN THE
Supreme Court of the United States

OCTOBER TERM, 1956.

No. ~~923~~ 103

CITY OF CHICAGO, A MUNICIPAL CORPORATION,

Petitioner.

vs.

THE ATCHISON, TOPEKA AND SANTA FE RAIL-
WAY COMPANY, ET AL.,

Respondents.

REPLY BRIEF OF CITY OF CHICAGO.

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1956.

No. 905.

CITY OF CHICAGO, A MUNICIPAL CORPORATION

Petitioner.

vs.

THE ATCHISON, TOPEKA AND SANTA FE RAIL-
WAY COMPANY, ET AL.,

Respondents.

REPLY BRIEF OF CITY OF CHICAGO.

The opinion of this court issued May 13, 1957, in *Government Employees v. S. F. Windsor*, No. 423, prompts us to clarify the only issue in the City's petition for the writ of certiorari which, perhaps, has become obscure by Respondents' summary of the opinion and decision of the Court of Appeals.

The latest pronouncement of this Court to which we have referred follows the policy, which is now firmly fixed, that the Federal courts should not pass on constitutional questions where an authoritative interpretation of local law may avoid constitutional issues.

The Court of Appeals did not confine its judgment to the invalidity of only one section of Chapter 28 of the Chicago Code, relating to public passenger vehicles, as represented by counsel for Respondents. (Brief, p. 2.) It is not quite clear from the opinion of the Court of Appeals what part or parts of Chapter 28 are enforceable against Respondent,

Transfer. For instance, the Court concluded "that it was unnecessary for Transfer to apply for licenses under the 1955 ordinance, because the issuance thereof unlawfully required a consent by the city to the prosecution of Transfer's business and was not merely a step in the regulation thereof." (Appendix B, p. 64, City's Petition.) This conclusion is irreconcilable with the Court's statement: "If Transfer's vehicles do not conform to the requirements contained in the prior ordinance (Ch. 28, Chicago Municipal Code) the city may refuse to issue licenses for the non-conforming vehicles and penalize their unlicensed operation in accord with Sec. 28-32. So, also, whenever Transfer is found guilty of violating Sec. 28-17 the city may proceed against it according to the penalties section." (Appendix B, pp. 51-52, City's Petition.) However, this much is too obvious from the opinion of the Court of Appeals to cause doubt as to the ordinance which was held invalid—the Court frequently was critical of the "1955 ordinance" with special significance of Sec. 28-31.1, added by the ordinance of 1955. (Appendix B, pp. 48 to 53, City's Petition.)

The "1955 ordinance" amended Secs. 28-1 and 28-31 and added Secs. 28-31.1 and 28-31.2. (Appendix A, pp. 16, 34-36, City's Petition.) The Federal courts below undertook to interpret, or assumed, the "1955 ordinance" to be applicable to interstation transfer service.

Sec. 28-1 of the Ordinance defines "Terminal vehicle," as a public passenger vehicle independent of control by or obligation to any interstate carrier. Sec. 28-31 limits the area of operation of such vehicles *from* railroad terminal stations and steamship docks. Sec. 28-31.1 limits the number of licenses for such vehicles as public convenience and necessity may require. And Sec. 28-31.2 regulates the fare for such vehicles to a uniform rate in the permissive area of operation, or zone, regardless of the distance traveled.

The mere recital of the provisions of the "1955 ordinance" and the incongruities in the opinion of the Court of Appeals emphasize the necessity of a definitive determination of local law questions by the local courts, before the Federal courts undertake to pass upon constitutional questions which may never arise if the state courts should construe the "1955 ordinance" to be inapplicable to inter-station transfer service, exclusively, as contended by Respondents in the District Court and the Court of Appeals. (*Government Employees v. S. F. Windsor*, No. 423—U. S. Supreme Court.)

Certainly Sec. 28-31.1 would not be invalid if Secs 28-31 and 28-31 were construed to be applicable only to local transportation operations from railroad terminal stations and steamship docks to points within the central business district of Chicago, as conducted by Parmelee.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957.

No. 103

CITY OF CHICAGO, A MUNICIPAL CORPORATION,

Petitioner,

vs.

THE ATCHISON, TOPEKA AND SANTA FE RAIL-
WAY COMPANY; THE BALTIMORE AND OHIO
RAILWAY COMPANY; ET AL.

**BRIEF OF PETITIONER ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT.**

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**BRIEF OF PETITIONER ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT.**

OPINIONS IN COURTS BELOW.

United States District Court, N. D. Illinois E. D., *Atchison, Topeka and Santa Fe Ry. Co. v. City of Chicago*, 136 F. Supp. 476.

United States Court of Appeals, Seventh Circuit, *Atchison, Topeka & Santa Fe Ry. Co. v. City of Chicago*, 240 F. 2d 930.

JURISDICTION.

The judgment of the Court of Appeals was entered January 17, 1957 (R. 212). Rehearing denied February 20, 1957 (R. 213). Petition for Writ of Certiorari filed in this Court invoked jurisdiction under 28 U. S. C. Sec. 1254 (1). Certiorari granted by order of this Court May 27, 1957 (R. 215).

CONSTITUTIONAL PROVISION, STATUTES AND ORDINANCE INVOLVED.

The statutes involved are Secs. 23-1, 23-10, 23-27, 23-51, 23-52, 23-81, 23-105 and 23-106 of the Revised Cities and Villages Act of Illinois (Ill. Rev. Stat. 1955, Chap. 24, Art. 23, pp. 581, 582, 584, 586, 589); printed in Appendix A, pp. 13, 14 of Petition for Writ of Certiorari.

The city ordinance involved is Chap. 28 of the Municipal Code of Chicago (R. 171-189), as amended by ordinance passed July 26, 1955 (Pl. Ex. B, R. 7, 44). Chap. 28, as amended is printed in Appendix A, pp. 14-36 of Petition for Writ of Certiorari, with the sections amended and added by ordinance of July 26, 1955, emphasized by italics.

The Court of Appeals relied upon the commerce clause of the U. S. Constitution, Art. I, Sec. 8, cl. 3, to declare the ordinance of July 26, 1955 invalid.

QUESTIONS PRESENTED FOR REVIEW.

The questions presented for review are stated in detail on pages 2 and 3 of the petition for the writ of certiorari granted by this Court. The sum and substance thereof are as follows:

1. Should the courts below have passed on constitutional issues affecting the enforcement of a city ordinance

purporting to license and regulate the operation of motor vehicles for public hire only at railroad terminals and steamship docks, without an authoritative decision by the State courts that the ordinance is applicable to operations under contracts with railroads carrying passengers and their baggage *en route* in interstate travel under tariffs which include the privilege of transfer between terminals in the city.

2. Are the operations of Respondent, Railroad Transfer Service, Inc., in performance of transfer, collection or delivery service by motor vehicles within the terminal area in the city of Chicago, subject to license and regulation pursuant to the provisions of Chapter 28 of the Municipal Code of Chicago (Pl. Ex. B, R. 171), if Section 28-31.1 of said chapter, as amended by the ordinance of July 26, 1955 (Pl. Ex. B, R. 44, '45),¹ is inapplicable to said Respondent's operations.

STATEMENT OF THE CASE.

Respondent railroads (hereinafter referred to as Terminal Lines) and Railroad Transfer Service, Inc. (hereinafter referred to as Transfer) brought action in the District Court against Petitioner, City of Chicago (hereinafter referred to as the city) and certain executive and administrative officers of the city for declaratory judgment and injunction against the enforcement of Chapter 28 of the Municipal Code of Chicago, as amended by an ordinance passed July 26, 1955, commonly known as the "Public Passenger Vehicle Ordinance" (hereinafter referred to as the Ordinance).

The Ordinance purports to license and regulate the op-

1. Chapter 28 of the Municipal Code of Chicago, as amended July 26, 1955, is printed in Appendix A to Petition for Writ of Certiorari, page 14, *et seq.* The amendments of July 26, 1955 are emphasized by italics.

eration of motor vehicles on any public way for the transportation of passengers for hire from place to place within the corporate limits of the city, excepting motor vehicles devoted exclusively for funeral use or in operation of a metropolitan transit authority or public utility under the laws of Illinois (Sec. 28-2).

The complaint asserts that the Ordinance does not apply to the operations of Transfer, pursuant to its agency contract (Pl. Ex. A, R. 25-42); and, if the Ordinance does apply to such operations, it is void as an attempt to regulate interstate commerce, in contravention of Art. I, Sec. 8, cl. 3 of the Constitution of the United States (R. 6, 7).

There are eight passenger terminals in the central business area of Chicago, each of which is used by some of Terminal Lines. None of Terminal Lines passes through Chicago. Railroad passengers travel through Chicago on through route tickets or coupons including transportation between terminals by motor vehicles of Transfer. Transfer began its operations on October 1, 1955, without a public passenger vehicle license and without applying for such license under the provisions of the Ordinance.

Before July 26, 1955, when Chapter 28 of the Municipal Code of Chicago was amended, Parmelee Transportation Company, a Delaware corporation (hereinafter referred to as Parmelee), operated terminal vehicles for public hire from railroad terminal stations and steamship docks to any destination within the central business area of Chicago, including transfer of passengers and their baggage between railroad terminals on through route railroad tickets or coupons. At that time, "Terminal vehicle" was defined as "a public passenger vehicle which is operated under contracts with railroad and steamship companies, exclusively for the transfer of passengers from terminal stations" (Pl. Ex. B, R. 172). Parmelee having been advised that its agency or contractual arrangement with

Terminal Lines was about to be terminated, and concerned that its investment in property and revenue would thereby be jeopardized, obtained from the city council amendments to Chapter 28 on July 26, 1955 (hereinafter referred to as the 1955 ordinance) to permit it to continue its operation without contractual arrangement with any carrier (Pl. Ex. B, R. 44, 45; Pl. Ex. 4, R. 90-92).

By virtue of the 1955 ordinance Parmelee service became available for public hire at railroad and steamship docks for local transportation, upon payment of cash fares, to destinations in the central business area of the city. Parmelee is the only licensee for such operation; and no more such licenses can be issued to anyone without council authority after a hearing to determine the public convenience and necessity for such additional service (Sec. 28-31.1, Pl. Ex. B, R. 44, 45).

Parmelee was permitted to intervene as party defendant to assert its claim that the operations by Transfer, without license or regulation under the Ordinance, have substantially and unfairly affected Parmelee's business, have inflicted incalculable losses of revenue and profits, have resulted in serious injury to Parmelee's good will and have severely hampered, impeded and obstructed Parmelee in its attempt to render adequate and lawful public passenger terminal services (R. 57, 60, 68). Parmelee asked the District Court to consider its intervening petition as an answer to the complaint, that the court declare the operations by Transfer are within the purview of the Ordinance and that Transfer be restrained from operating upon the streets and public places of the city without terminal vehicle licenses (R. 60, 51).

The city then filed a motion for summary declaratory judgment, pursuant to Rule 56 of the Federal Rules of Civil Procedure, to determine whether Transfer's opera-

tions are subject to license and regulation under the Ordinance (R. 71).²

The District Court permitted the city to file its motion (R. 73); and the case was argued by counsel for Terminal Lines and Transfer, and Parmelee as the adversary. The court found that Transfer's vehicles are "terminal vehicles" as defined in Section 28-1, and are subject to the provisions and regulations of Chapter 28 of the Municipal Code of Chicago, as amended, applicable thereto (R. 115).

On appeal, the case was argued for the city and Parmelee by counsel for Parmelee, the corporation counsel of the city appearing with him on the brief. The Court of Appeals did not consider the question whether the Ordinance is applicable to Transfer's operations. The Court reversed and remanded the judgment of the District Court, after concluding that Section 28-31.1 of the 1955 ordinance limited the number of terminal vehicle licenses to those held by Parmelee on July 26, 1955, and therefore is invalid (240 F. 2d 939).

2. Seven special interrogatories based on provisions of the Ordinance affecting the ultimate issue were submitted by the city's motion. They are set forth in the Petition for Writ of Certiorari pp. 4, 5, for convenience of this Court.

SUMMARY ARGUMENT.

1. Section 28-31.1 of the Ordinance did not grant to Parmelee a monopoly of the use of city streets for transfer of passengers by motor vehicles between railroad terminals, since the number of terminal vehicle licenses and the rights of licensees are subject to the control of the city under its police power.

2. The courts below were in error in assuming that Section 28-31.1 of the Ordinance applies to terminal vehicles under contract with railroads for transfer of their passengers in interstate commerce between railroad terminals in Chicago on through route tickets or coupons, including such transfer privilege.

3. The courts below should not have undertaken to adjudicate a controversy concerning the proper construction of a city licensing ordinance until efforts to obtain licenses and an appropriate adjudication in the State courts have been exhausted.

4. The Court of Appeals erred in considering statements of the chairman of the local transportation committee of the city council and alleged statements of counsel for the city to determine the intent of the city council in passing the Ordinance.

5. The Court of Appeals ignored the uniform and long established policy of the federal courts not to pass on constitutional questions if the record presents some other ground upon which the case may be decided, or in cases where the underlying issue involves the construction of a State statute or city ordinance.

ARGUMENT.

I.

The intention of the city council in enactment of an ordinance must be determined from the language used and not from statements of the author of the ordinance or by members of the council.

The Court of Appeals laid great stress upon meetings of the committee on local transportation of the city council, held on June 21 and 26, 1955, to show the intent of the chairman of the committee and his motive in the preparation of an ordinance granting an exclusive franchise to Parmelee for 10 years "for the operation of terminal vehicles to transfer passengers and their baggage between railroad stations", to which counsel for the city was said to have objected because it was not in proper form; and further that said counsel "had prepared a substitute ordinance which would accomplish what the committee had in mind, namely, placing the licensing and operation of terminal vehicles under the complete control of the City of Chicago." (240 F. 2d 935.)

The Court of Appeals was in error, *first* as to the nature of the proposed franchise ordinance; *second*, as to the nature of the objection to said proposed ordinance by counsel; and *third*, as to the meaning and purpose of the substitute ordinance.

The first error appears in the definition of "Terminal vehicle" in the proposed franchise ordinance which clearly indicates that it was not for operation "to transfer passengers and their baggage *between* railroad stations," as stated by the Court of Appeals (240 F. 2d 935), but was "for the transfer of passengers *to and from* ter-

terminal stations of railroad and steamship companies. (Pl. Ex. 3, R. 85.)

The second error was that counsel for the city did not state that he objected to the *form* of the proposed franchise ordinance, but he questioned the *corporate power* of the city to enact such ordinance (R. 91).

The third error was that counsel for the city stated quite clearly that terminal vehicles as defined (before the 1955 ordinance) did not embrace those vehicles that operated *between* railroad stations. "The operation [was] from the railroad stations to points within the central business district. It is in the railroad terminal area, but it isn't necessarily between railroad stations. It may go from railroad stations to hotels and from hotels to railroad stations. That is the operation. And that operation can be continued by amendments to the present ordinance without conflicting with any of the statutory provisions" (R. 92).

The statements of the chairman cannot be ascribed to counsel for the city and the chairman's motives in submitting for consideration of the city council a proposed ordinance or ordinances certainly cannot be ascribed to the city council in the passage of an ordinance.

The Court of Appeals evidently stated the facts which occurred at the meetings of June 21 and 26, 1955, from the minutes of the committee on local transportation (Pl. Ex. 5, 6, R. 93, 94, 95), disregarding a verified transcript of the colloquy between the chairman and members of the committee and counsel for the city (Pl. Ex. 4, R. 92). It is not shown anywhere in the record that minutes of a committee of the city council recorded by a clerk acting as secretary of the committee, which includes matter other than official action, such as a motion made by a member thereof and a vote thereon, is an official record.

of statements made by members of the committee and other persons interested in its proceedings, especially when there is a transcript of shorthand notes taken by a court reporter containing a verbatim report of conversations which impeach the so-called minutes transcribed by the committee's secretary.

The People v. Chicago Ry. Cos., 270 Ill. 87; 110 N. E. 386 (1915), involved the construction of a city ordinance which granted to defendant's predecessors the right to maintain and operate street railways upon certain streets and established a 5-cent fare with transfer privileges between the railway lines east and west of the city limits of Chicago. New matter was set forth in a replication alleging that the city council passed an ordinance reported to the council by the local transportation committee which was in all respects identical with an ordinance set up in a plea theretofore filed, with an additional clause in Section 8 that it was not intended by said section to change, add to, or detract from earlier ordinances, except as therein and thereby provided; that thereupon counsel concerned in this case on behalf of the petitioner saw the mayor and various members of the committee on local transportation regarding said ordinance and the mayor addressed a communication to said counsel, stating that the corporation counsel did not agree with his contention and did not regard the insertion of the clause as finally settling the controversy.

The Court said:

"We have held that the rules for the construction of an ordinance are the same as those applied in the construction of a statute. (*People v. Hummel*, 215 Ill. 43; *People v. Mohr*, 252 *id.* 160.) It is a primary rule in the interpretation and construction of a statute that the intention of the legislature is to be ascertained and given effect. (*People v. Price*, 257 Ill. 587.) This rule does not, however, permit the courts

to consider statements made by the author of a bill or by those interested in its passage, or by members of the legislature adopting the bill, showing the meaning or effect of the language used in the bill as understood by the person or persons making such statements.

"A further reason exists why these matters cannot be considered by the courts in construing that section. The ordinance was passed by the city council,—not by the local transportation committee,—and it does not appear from the replication that any of the correspondence referred to or any of the statements made at the meeting of the committee on local transportation were brought to the attention of the city council when the proposed ordinance of March 18, 1913, was submitted to the council. It is the intention of the city council which the courts must endeavor to determine,—not the intention of the members of some committee having the proposed ordinance before them for consideration before it was presented to the council. So far as this record discloses, the courts, in construing said section 8, are limited to the language used in the section, considered in connection with the situation existing between the Chicago Railways Company, the village of Oak Park and the city of Chicago at the time the ordinance was passed, which situation was fully disclosed by the petition and plea." (270 Ill. 105, 107.)

In *People Ex Rel. Brenza v. Gebbie*, 5 Ill. 2d 565; 126 N. E. 2d 567 (1955), the Supreme Court of Illinois cited the foregoing case with approval and referred to other cases of similar import, as follows:

"In the early case of *Bellefonte and Illinois-town Railroad Co. v. Gregory*, 15 Ill. 20, this court adopted the rule that the meaning or effect of a statute cannot be determined by considering the statements and opinions of persons interested in its passage. This rule was reiterated in *People ex rel. Dwight v. Chicago Railways Co.*, 270 Ill. 87, at page 106, where it is said: 'When the courts shall be driven to the

lobbies of the legislature to learn the sentiments of the members, for the purpose of construing the laws, a new rule of construction will have been adopted. Of like effect is *Eddy v. Morgan*, 216 Ill. 437, pp. 448-449." (5 Ill. 2d 577.)

The Corporation Counsel, in behalf of the city, filed a separate petition for rehearing requesting modification of the opinion of the Court of Appeals by deletion of the subject matter preceding the passage of the 1955 ordinance, or by modifying same in accordance with the facts. The petition for rehearing, among other documents and briefs, was designated by Respondents' counsel to be included in the transcript of record certified to this Court by the Court of Appeals. Reference is here made to quotations from the said petition in the Appendix to this brief. The petition for rehearing was denied (R. 213).

II.

The city has power to license and regulate the use of city streets for transportation of passengers for hire, even though interstate commerce is affected thereby, without placing an unreasonable burden thereon.

It is conceded by all parties in interest in this case and in the opinions of the courts below that, in the absence of unequivocal preemption by the federal government, the city has power and the right to license and regulate the use of city streets for transportation of passengers, even though interstate commerce is affected thereby. *Atchison Topeka & Santa Fe Railway Co. v. City of Chicago*, 240 F. 2d 930, 936, 940 (1957). *Sprout v. South Bend*, 277 U. S. 163; 72 L. ed. 833 (1927). *Cities Serv. Co. v. Peerless O. & G. Co.*, 340 U. S. 179, 186; 95 L. ed. 190, 202 (1950) and cases therein cited.

In the case last cited this Court said:

"The Commerce Clause gives to the Congress a power over interstate commerce which is both paramount and broad in scope. But due regard for state legislative functions has long required that this power be treated as not exclusive. *Cooley v. Port Wardens*, (U. S.) 12 How. 299, 13 L. ed. 996 (1851). It is now well settled that a state may regulate matters of local concern over which federal authority has not been exercised, even though the regulation has some impact on interstate commerce. *Parker v. Brown*, 317 U. S. 341, 87 L. ed. 315, 63 S. Ct. 307 (1943); *Milk Control Board v. Eisenberg Farm Products*, 306 U. S. 346, 83 L. ed. 752, 59 S. Ct. 528 (1939); *South Carolina Highway Dept. v. Barnwell Bros.*, 303 U. S. 177, 82 L. ed. 734, 58 S. Ct. 510 (1938). The only requirements consistently recognized have been that the regulation not discriminate against or place an embargo on interstate commerce, that it safeguard an obvious state interest, and that the local interest at stake outweigh whatever national interest there might be in the prevention of state restrictions. Nor should we lightly translate the quiescence of federal power into an affirmation that the national interest lies in complete freedom from regulation. *South Carolina Highway Dept. v. Barnwell Bros.*, (U. S.) *supra*. Compare *Leisy v. Hardin*, 135 U. S. 100, 34 L. ed. 128 (1890), decided prior to the Wilson Act [Aug. 8, 1890], 26 Stat. 313, ch. 728, with *Re Rahrer* (*Wilkerson v. Rahrer*), 140 U. S. 545, 35 L. ed. 572, 11 S. Ct. 865 (1891), decided thereafter."

The decision of the Court of Appeals rested upon its construction of Section 28-31.1 of the 1955 ordinance, which, the court said, "would in effect limit the number of terminal vehicle licenses to those held by Parmelee on July 26, 1955 and give Parmelee perpetual control thereof; constitute a designation of Parmelee by the council of the city, in lieu of Transfer, the instrumentality selected by the Terminal Lines, rather than an exercise of the city's police power over traffic." (240 F. 2d 939).

The Court of Appeals gave no consideration to the difference between the operations by Parmelee and the operations by Transfer, affecting interstate commerce. The difference between these operations is that Parmelee undertakes to carry travelers and other persons who come into a terminal station for transportation to another terminal or to any other destination within the central business area of the city, as directed by its passengers, independently of any railroad or steamship journey, whereas, Transfer under contract with Terminal Lines is limited to the transportation of railroad passengers *en route* between terminals within the city, pursuant to through route tickets, upon payment of fares which include Transfer service. The two operations are clearly distinguishable. *Sprout v. South Bend*, 277 U. S. 163, 168; 72 L. ed. 833, 836 (1927).

In *United States v. Yellow Cab Co.*, 332 U. S. 218 (1946), involving a complaint for violation of the Sherman Anti-Trust Act; this Court distinguished the local operations of taxicabs and the operation of Parmelee terminal vehicles under contracts with railroad and steamship companies as defined in section 28-1 of the Public Passenger Vehicle Ordinance before it was amended by the ordinance of 1955. Under the ordinance of 1955 Parmelee operations are of the same character as taxicabs, affecting interstate commerce, while Transfer has taken the place of Parmelee in its operations under contract with Terminal Lines.

This Court said (332 U. S. 228):

“ * * * The complaint points out the well-known fact that Chicago is the terminus of a large number of railroads engaged in interstate passenger traffic and that a great majority of the persons making interstate railroad trips which carry them through Chicago must disembark from a train at one railroad station, travel from that station to another some two blocks to two miles distant, and board another train at the latter station. The railroads often contract with the passen-

gers to supply between-station transportation in Chicago. Parmelee then contracts with the railroads and the railroad terminal associations to provide this transportation by special cabs carrying seven to ten passengers. Parmelee's contracts are exclusive in nature.

"The transportation of such passengers and their luggage between stations in Chicago is clearly a part of the stream of interstate commerce. When persons or goods move from a point of origin in one state to a point of destination in another, the fact that a part of that journey consists of transportation by an independent agency solely within the boundaries of one state does not make that portion of the trip any less interstate in character. *The Daniel Ball*, 10 Wall. 557, 565. That portion must be viewed in its relation to the entire journey rather than in isolation. So viewed, it is an integral step in the interstate movement. See *Stafford v. Wallace*, 254 U. S. 495."

and on pages 230-232 this Court described the local character of transportation to and from railroad stations contracted for by travelers independently of the railroad journey.

Beginning at page 230,

"Many persons are said to embark upon interstate journeys from their homes, offices and hotels in Chicago by using taxicabs to transport themselves and their luggage to railroad stations in Chicago. Conversely, in making journeys from other states to homes, offices and hotels in Chicago, many persons are said to complete such trips by using taxicabs to transport themselves and their luggage from railroad stations in Chicago to said homes, offices and hotels. Such transportation of persons and their luggage is intermingled with the admittedly local operations of the Chicago taxicabs. * * *"

"But interstate commerce is an intensely practical concept drawn from the normal and accepted course of business. *Swift & Co. v. United States*, 196 U. S. 375, 398; *North American Co. v. S. E. C.*, 327 U. S. 686,

705. And interstate journeys are to be measured by 'the commonly accepted sense of the transportation concept.' *United States v. Capital Transit Co.*, 325 U. S. 357, 363. Moreover, what may fairly be said to be the limits of an interstate shipment of goods and chattels may not necessarily be the commonly accepted limits of an individual's interstate journey. We must accordingly mark the beginning and end of a particular kind of interstate commerce by its own practical considerations.

"Here we believe that the common understanding is that a traveler intending to make an interstate rail journey begins his interstate movement when he boards the train at the station and that his journey ends when he disembarks at the station in the city of destination. What happens prior or subsequent to that rail journey, at least in the absence of some special arrangement, is not a constituent part of the interstate movement. The traveler has complete freedom to arrive at or leave the station by taxicab, trolley, bus, subway, elevated train, private automobile; his own two legs, or various other means of conveyance. Taxicab service is thus but one of many that may be used. It is contracted for independently of the railroad journey and may be utilized whenever the traveler so desires. From the standpoints of time and continuity, the taxicab trip may be quite distinct and separate from the interstate journey. To the taxicab driver, it is just another local fare."

The Court of Appeals ignored the fact that the ordinance of 1955 was an integral whole. It construed Section 28-31.1 of said ordinance, which restricts the number of licenses for terminal vehicles to public convenience and necessity, in isolation rather than in its relation to other sections of the 1955 ordinance. Said ordinance amended the definition of "Terminal vehicle" by divorcing the operation of such vehicle from railroad and steamship carriers, and amended Section 28-31 by limiting the hire of such terminal vehicles from railroad terminal stations and steamship

docks. It added section 28-31.1, which governs the licensing of *terminal vehicles as defined by the 1955 ordinance*, and concededly applies to Parmelee operations without contractual arrangement with any railroad or steamship company. It also added Section 28-31.2 regulating the rate of fare of such terminal vehicles *for local transportation of passengers*. Section 28-31.1 does not grant to Parmelee any monopoly and is a valid exercise of the police power of the city in the regulation of local transportation, under Illinois law, "since the number of licenses and the rights of licensees are subject to the control of the city." *People ex rel. Johns v. Thompson*, 341 Ill. 166; 173 N. E. 137 (1930); *Yellow Cab Co. v. City of Chicago*, 396 Ill. 388; 71 N. E. 2nd 652 (1947); *United States v. Yellow Cab Co.*, 332 U. S. 218, 224; 91 L. ed. 2010, 2016 (1946).

Granted that Section 28-31.1 is valid, if limited to local transportation operations of terminal vehicles as defined in the 1955 ordinance, there is still the question whether Transfer is subject to license and regulation as a public passenger vehicle, within the meaning of the Ordinance. That question was submitted to the courts below by the city's motion for summary declaratory judgment (R. 71).

III.

The question of the validity of section 28-31.1 of the Ordinance was not subject to decision or consideration by the federal courts.

The validity of section 28-31.1 of the Ordinance cannot be drawn in question until the State courts by authoritative decision should hold that Transfer operations are subject to license and regulation as public passenger vehicles, within the terms of the Ordinance, and specifically that they come within the class of public passenger vehicles defined as "Terminal vehicles" to which section 28-31.1

is explicitly applicable, or at least until Transfer has made application for licenses and is refused because Parmelee's service is adequate and sufficient to satisfy public convenience and necessity.

It is clearly the duty of the Supreme Court to ascertain from the record whether the courts below had jurisdiction, though that question was not raised by counsel in the District Court or the Court of Appeals. *M. C. & L. Ry. Co. v. Swan*, 111 U. S. 379, 382 (1884); *Shanferoke C. & S. Corp. v. Westchester S. Corp.*, 293 U. S. 449; 79 L. ed. 583, 586 (1935); *Clark v. Paul Gray*, 306 U. S. 583; 83 L. ed. 1001 (1939).

The policy of this court in avoiding or postponing consideration of constitutional questions in advance of necessity has not been limited to jurisdictional determinations. *Rescue Army v. Municipal Court*, 331 U. S. 549, 91 L. ed. 1666, 1678 (1947); *Chicago v. Fieldcrest Dairies*, 316 U. S. 168, 86 L. ed. 1355 (1941).

In *Government & C. E. O. C., CIO v. Windsor*, 353 U. S. 364; 1 L. ed. 2d 894 (1957), an action was brought in the District Court to restrain the enforcement of a State statute on constitutional grounds. The court withheld the exercise of its jurisdiction to permit the exhaustion of such State administrative and judicial remedies as may be available. Appellant Union then commenced an action in the Alabama court to obtain an authoritative construction of the State statute prohibiting any public employee to join or participate in labor union or labor organization under penalty of forfeiture of the right to his public employment. In its complaint the Union denied that the statute applied to it or its members. None of the constitutional contentions presented in the Federal court were advanced in the State court action. The Alabama Supreme Court held that a local union operating under its rules and constitution would be subject to the provisions of the Act. This Court said (1 L. ed. 2d 896):

"The bare adjudication by the Alabama Supreme Court that the union is subject to this Act does not suffice, since that court was not asked to interpret the statute in light of the constitutional objections presented to the District Court. If appellants' freedom of expression and equal protection arguments had been presented to the state court, it might have construed the statute in a different manner. Accordingly, the judgment of the District Court is vacated, and this cause is remanded to it with directions to retain jurisdiction until efforts to obtain an appropriate adjudication in the state courts have been exhausted."

To comply with the last opinion of this Court upon this subject, the construction of Section 28-31.1 of the 1955 ordinance must be adjudicated by the Illinois courts, in the light of the constitutional objection that if said section is applicable to Transfer it would violate the commerce clause of the constitution. Objection by Respondents to the city's right to take a different position before this Court from that in the Court of Appeals, even if true, does not affect the right of this Court to vacate, reverse or otherwise nullify the judgments of the lower courts on jurisdictional grounds or in pursuance of the established policy of the federal courts to avoid or postpone constitutional questions in advance of necessity.

City and County of Denver v. Denver Tramway Corp., 23 Fed. 2d 287 (cert. den. 278 U. S. 616) cited by Respondents for denial of the city's right to take a different position before this Court in certiorari from that in the Court of Appeals, was an appeal from the U. S. District Court enjoining enforcement of an ordinance fixing rates of fare which were alleged to be confiscatory and violative of the Federal Constitution. Federal jurisdiction was based upon diversity of citizenship. The City raised the question that the court below was without jurisdiction. The Company contended that the question of jurisdiction was passed upon

adversely to the City upon a former appeal to the United States Supreme Court which had reversed the case on another point, but sustained it as to the question of jurisdiction (p. 294).

In the case here, the question of propriety of deciding a constitutional question without necessity or before a decision of the underlying question of construction of a city ordinance governed by State law first arose by the decision of the Court of Appeals which has been brought to this Court by certiorari.

C. St. P. M. & O. Ry. Co. v. United States, 322 U. S. 1 (1943), cited by Respondents in support of their claim that it is too late for petitioner to raise the question whether the lower courts should have remitted the issue on the construction of the ordinance to the Illinois courts because petitioner made no such suggestion in its Petition for Rehearing, involved the propriety of an order of the Interstate Commerce Commission granting operating authority to a motor carrier of goods in interstate commerce, upon condition that service between points in Minnesota established by the motor carrier under "grandfather rights" be continued, after finding that such service was required by the public convenience and necessity, although the carrier had withdrawn request for authority to continue such service. This case is inapposite to any question involved in the case before the court.

However, the city has not changed its position at any stage of the litigation. Action was brought by Respondents in the District Court for declaratory judgment, as a test case, to determine whether Transfer is required to secure city licenses for its operations,³ and to enjoin the city from

3. See Appendix B, p. 25a, to Separate Brief of Transfer, filed in the Court of Appeals and certified to this Court, for argument of counsel for Transfer before the District Court as to agreement between Respondents and the city for test case. Excerpts from said argument are included in the Appendix to this brief.

interfering with said operations. Parmelee filed its petition to intervene as a party in interest to restrain Transfer's competitive operations without license, and the petition for intervention was granted and accepted as an answer to Respondent's complaint. The issues were joined between Transfer and Parmelee before the city filed any pleading. The city stood by in the contest between Transfer and Parmelee and filed a motion for summary declaratory judgment upon the undisputed material facts and issues of law, submitting to the Court special interrogatories pertaining to declaratory judgment in the case. The issue submitted to the District Court by the city's motion was confined to the construction of the ordinance concerning which there was a controversy between Parmelee and Respondents. The city's position was that the case did not involve any constitutional question. The District Court rendered judgment that Transfer is subject to license and regulation by the terms of the Ordinance. Respondents appealed and the case was argued in the Court of Appeals by the attorney for Parmelee, the Corporation Counsel appearing with him on the brief. The city's position on the motion for summary declaratory judgment, confined to the construction or meaning of the Ordinance, remained unchanged in the Court of Appeals. The decision that Section 28-31.1 of the 1955 ordinance is unconstitutional because it grants a monopoly to Parmelee was rendered by the Court of Appeals for the first time on the unwarranted assumption that said section imposed an unreasonable burden upon Transfer's business in interstate commerce.

This Court has consistently held to the practice of not passing on constitutional questions if the record presents some other ground upon which the case may be decided; or in situations where an authoritative interpretation of State law may avoid the constitutional issues.

Doud v. Hodge, 350 U. S. 485 (1955), cited by Respondents' attorneys in opposition to petition for certiorari (p. 8) was an action to enjoin enforcement of the Community Exchange Act of Illinois which required *Doud et al.* to obtain licenses and to submit to regulation of their business of selling and issuing money orders in the State, while the American Express Company, engaged in identical business activity in Illinois, was excepted from the operation of the Act. Jurisdiction was asserted under 28 U. S. C. Sec. 1331, on the ground that the Act denied them equal protection of the laws in violation of Sec. 1 of the Fourteenth Amendment to the Federal Constitution. The suit was tried before a three-judge District Court. There was no underlying issue upon the construction of the State law. The issue related to the validity of the discrimination.

Propper v. Clark, 337 U. S. 472 (1948), cited in said Respondents' brief, involved an action under the Trading with the Enemy Act, instituted by the Alien Property Custodian to obtain payment and a declaration of title in him against a receiver appointed by a State court. The Trading with the Enemy Act was federal legislation founded on Federal constitutional provisions, and this Court held that the power to enact carries with it final authority to declare the meaning of the legislation (337 U. S. 484). The question of the effect of the appointment of a temporary receiver by the State court on an Executive Order freezing the assets of an alien association before issue of the Executive Order was a subsidiary issue in the case. This Court distinguished the case from *Spector Motor, Fieldcrest, Pullman*, and other cases where the underlying issue was one of State law, to avoid an interpretation of the Federal Constitution (337 U. S. 490).

Conclusion.

The judgment of the Court of Appeals should be reversed and remanded with directions to expunge from the record the recital of the proceedings before the local transportation committee, and to remand the cause to the District Court with directions to vacate the judgment of said court and to retain jurisdiction until efforts to obtain an appropriate adjudication in the State courts have been exhausted.

Respectfully submitted,

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(p. 24 is blank)



APPENDIX.

Excerpts from pages 2 and 3 of petition for rehearing in the United States Court of Appeals filed by City of Chicago.

"The colloquy at the meetings of the city council committee on local transportation upon the subject of a proposed ordinance affecting operation of 'terminal vehicles' under license and regulation by the city has been misapprehended by the court, to imply that a substitute ordinance prepared by Mr. Grossman was a subterfuge to prohibit or interfere with the Terminal Lines in selecting any motor vehicle operator, other than Parmelee, to transfer passengers and their baggage in interstate commerce between railroad terminals.

"Plaintiff's Exhibit No. 4 (R. 90-92) which purports to be an excerpt from the proceedings before the local transportation committee does not justify the intent ascribed by the court to Mr. Grossman in the preparation of a substitute ordinance for the chairman's proposed ordinance which would have granted an exclusive franchise for 10 years to Parmelee for the operation of motor vehicles to transfer passengers and their baggage between railroad stations. Such construction of purpose and intent implies, if it does not charge, conduct derogatory to the reputation of a member of the bar of Illinois and of this court.

"The court's attention is directed to Mr. Grossman's specific answers to questions by the aldermen on page 92 of the record, which clearly show that a 'terminal vehicle,' as defined in Section 28-1 of the amended ordinance (R. 41), does not embrace vehicles that are limited to operation between railroad stations.

The court has been misled by the continued use of 'terminal vehicle' which originally was descriptive of a railroad and steamship passenger transfer vehicle. All that was claimed by the amended ordinance was to permit Parmelee to continue its operations as a local carrier of passengers, without identification as railroad or steamship passengers, for cash fares regulated by Section 28-31.2 of the ordinance (Exhibit B, complaint, R. 45).

"The plain and unequivocal purpose of the ordinance of July 26, 1955, was to permit Parmelee to continue its operation within a defined territorial zone, subject to regulation with other local public passenger vehicles, such as taxicabs, liveries and sight-seeing vehicles. The ordinance does not purport, and cannot be construed, to preclude any railroad or steamship company from providing motor vehicles for the transfer of its passengers between terminal stations in the city upon through route tickets, subject to local regulation as may be lawfully imposed without conflict with federal authority."

"We respectfully suggest that recital of the proceedings before the local transportation committee does not appear to be essential to the judgment of this court."

Excerpts from Appendix B, p. 25a, to brief and argument for Transfer in the United States Court of Appeals, designated by Respondent's counsel to be included in the transcript of record certified to this Court by the Court of Appeals.

"Mr. Goldstein: * * * What we did, in order that there would be no question about a conflict between the City, we eliminated those two services and the contract so states, and the complaint so states. We have been performing that."

The Court: Does the corporation counsel disagree with you on your interpretation?

Mr. Goldstein: No. The truth of the matter is that on September 30, I was informed by the corporation counsel's office that it did not violate.

Since then there has been, for one reason or another, the question has—there has been pressure brought to litigate it to get a final determination of it.

The Court: Well now, you say they are threatening to arrest the drivers?

Mr. Goldstein: Yes, sir. They have indicated, as Mr. Crawford said, that rather than arrest the drivers and try it that way, they suggested we initiate the suit in the Federal Court so that a final determination could be made of the issue.

The Court: Well, I think you are entitled to a temporary restraining order."

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FILED

NOV 4 1957

JOHN T. FEY, Clerk

IN THE
Supreme Court of the United States

OCTOBER TERM, 1957.

No. 103

CITY OF CHICAGO; A MUNICIPAL CORPORATION,

Petitioner,

vs.

THE ATCHISON, TOPEKA AND SANTA FE RAIL-
WAY COMPANY; THE BALTIMORE AND OHIO
RAILWAY COMPANY; ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE SEVENTH CIRCUIT.

PETITIONER'S REPLY BRIEF.

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PETITIONER'S REPLY BRIEF.

STATEMENT.

Certiorari was granted in this case because the commerce clause of the U. S. Constitution, Article I, Sec. 8, cl. 3, became the decisive issue for the first time in the Court of Appeals to determine that Transfer's operation of motor vehicles in the city of Chicago for transportation of passengers between railroad terminals on through route railroad tickets in intrastate and interstate commerce were not subject to license and regulation under a city ordinance, which the District Court held to be applicable to Transfer's vehicles. The question of the applicability of the Ordinance to Transfer's operations was brought in issue by respondents in the District Court and was at issue in the Court of Appeals. The propriety of the Court of Appeals in undertaking to decide the case on constitutional grounds when there was a question of the proper construction of the city ordinance under state law is the sole issue in this case.

ARGUMENT.

I.

The Question of the Applicability of the Ordinance.

Petitioner agrees that this question is not before this Court for adjudication. But neither is the question of the constitutionality of Section 28-31.1 of the Ordinance before this Court. The only question now is whether the Court of Appeals should have considered the constitutional question before respondents had exhausted their state administrative and judicial remedies by applying for a license and, if arbitrarily refused, securing an authoritative decision of the State courts as to the applicability of the Ordinance to Transfer's operations.

Petitioner has not changed its position in the course of the litigation in the lower courts. The issues remain the same upon the face of the record, as they were by the pleadings in the District Court. Respondents were the first to contend that the Ordinance has no application to Transfer's passenger motor vehicles by refusing to apply for licenses under the Ordinance and by basing its complaint on that ground (R. 11, 22). Laramee intervened as party defendant praying that the court enter judgment declaring that Transfer's operations constitute the operation of public passenger terminal vehicles within the purview of the Ordinance and that it is required to secure licenses for its operations and to comply with all reasonable police power requirements imposed by the city ordinances upon public passenger vehicles and public passenger vehicle operators (R. 61). The city filed a motion for summary declaratory judgment upon that record, submitting seven special interrogatories deemed material for deter-

mining, the question of the applicability of the Ordinance to Transfer's operations as a matter of law (R. 71, 72).

It is true that the city submitted to the jurisdiction of the District Court the question of the applicability of the Ordinance to Transfer, but there is nothing in the record of this case to indicate that the city considered the presence of any constitutional question or that the validity or construction of Section 28-31.1 of the Ordinance was necessarily involved in determining whether the regulation of Transfer's operations by license and enforcement of the police ordinances governing such operations are applicable to Transfer. None of the special interrogatories submitted by the city makes mention of Section 28-31.1. The ultimate issue can be decided by proper construction of section 28-1, defining "Public passenger vehicle" and "Terminal vehicle," as amended by the 1955 ordinance, or by Section 28-2, making it unlawful to operate any vehicle for transportation of passengers for hire from place to place within the corporate limits of the city unless it is licensed as a public passenger vehicle.

The validity of Section 28-31.1, on constitutional grounds, became the crucial issue in the opinion of the Court of Appeals because that court failed to consider the question of the applicability of the Ordinance to Transfer's operations, from the language thereof. Instead, the Court directed its inquiry to the motives or interest of the authors in adding Section 28-31.1 to the Ordinance by the 1955 amendment which the court considered "significant", although it was conceded by Parmelee and the city in argument that a license to carry on interstate transfer operations cannot be withheld on economic grounds of public convenience and necessity (Appellees' Brief in Court of Appeals pp. 36, 37).

The Court of Appeals did not hold Chapter 28 applicable to respondents, as asserted in their brief, pp. 9, 14 (R.

208-209; 200). It not only held Section 28-31.1 of the Ordinance invalid, but held the entire 1955 ordinance invalid (R. 208). It thereby struck down the new definition in section 28-1 of "Terminal vehicle," as a public passenger vehicle, without any contractual right or obligation to transfer railroad or steamship passengers *en route* in interstate travel between terminals. It also nullified section 28-31, as amended by the 1955 ordinance, to remove the necessity of a contract with one or more railroad or steamship companies to qualify any person for a terminal vehicle (R. 188). Finally, it denied the city the right to regulate the rate of fare for local transportation of passengers in terminal vehicles, granted by the city's charter. (Section 23-51, Chapter 24 Cities and Villages Act, Ill. Rev. St. 1955, Appendix A, Petition for Writ of Certiorari).

Respondents, not the city, have changed their position in this case as to the applicability of the Ordinance to Transfer's operations. In the concluding page of their reply brief in the District Court, certified to this Court as part of the unprinted record in the Court of Appeals, all counsel for respondents joined in the following statement, appearing in the Appendix to this brief:

"The defendants have filed a motion for summary judgment which in effect asks certain questions. The plaintiffs' foregoing argument deals fully with the subject matter of all such questions. It is submitted that the questions should receive the following answers:

Questions 2 and 3: Yes.

All other questions: No."

Question 2, was whether Transfer by virtue of its contract with the plaintiff railroad companies is operating its vehicles within the city of Chicago exclusively as agent for and in behalf of plaintiff railroads as public utilities under the laws of Illinois. Question 3, was whether Transfer's operations are confined to the transportation of passengers on through route railroad and steamship tickets

between points outside of the corporate limits of the city in intrastate and interstate commerce.

The answers to all other questions in the motion of defendants, City of Chicago, its Mayor, Corporation Counsel, Commissioner of Police and Public Vehicle License Commissioner were that Transfer is not a public utility under the laws of Illinois; that it does not operate any vehicles for transportation of passengers for hire from place to place within the corporate limits of the city as provided in Section 23-22 of the Municipal Code of Chicago; that it does not operate terminal vehicles as defined in Section 28-1 of said code, as amended July 26, 1955; that its operations are not in local transportation of passengers at rates of fare subject to Section 28-31.2 of said code, as amended July 26, 1955; and that its operations are not subject to the provisions of Chapter 28 of said Code (R. 71-72).

The Illinois cases cited on page 15 of respondents' brief in support of their argument that the city cannot now take the position that the courts below erred in agreeing with the city as to the applicability of the Ordinance are not pertinent to the facts in this case. The city filed no answer to the complaint or otherwise pleaded in the courts below that section 28-31.1 is applicable to Transfer's operations. In any event, the policy of the Federal Courts in withholding the exercise of jurisdiction to permit the exhaustion of state administrative and judicial remedies as may be available to determine rights under state laws, and particularly the policy of this Court in avoiding or postponing consideration of constitutional questions in advance of necessity, is not governed by consent or passive submission of the litigating parties. (See citations in Petitioner's Brief on Writ of Certiorari p. 18.)

N. Y. Elevated Railroad v. Fifth Nat. Bk., 135 U. S. 432, cited in respondents' brief, p. 15; involved an action for

damages for construction of a track and station house in front of the banking-house. It appears that the law of New York was that the owner of lands abutting on a city street having an easement of way and of light and air over it and may recover of the elevated railroad company full compensation for permanent injury to this easement. This law was followed in the case.

The general rule of estoppel applied in the case of *Callanan Road Co. v. United States*, 345 U.S. 507, cited in respondents' brief, p. 15, although inapplicable to the position of the city in this case, does not bar this Court from following its established policy in avoiding or postponing consideration of constitutional questions in advance of necessity.

2.

Occasion for Remission of Issue to Illinois Courts.

Respondents have argued that the city has made no attempt to point to any ambiguity in Chapter 28; that the Ordinance is so clear that no occasion exists for remission of issues to the Illinois courts. In support of this argument, they assert that the city obtained judgments which it requested in the courts below holding that Chapter 28 is applicable to respondents' interstation transfer service, and that the city cannot now for the first time contend that the cause should be remitted to Illinois courts for construction of the Ordinance.

Respondents believed and strenuously argued that the Ordinance was not applicable to Transfer's operation. Parmelee was emphatic in its claim not only that Transfer's operations were clearly those of a public passenger vehicle, within the definition of Section 28-1, but also that its vehicles are "terminal vehicles," as defined in said section.

To resolve the issue between respondents and Parmelee, a suit was instituted in the District Court. (Excerpts from Appendix B, p. 25a to Transfer's brief in Court of Appeals; Petitioner's brief on writ of certiorari, p. 27.) The District Court held that Transfer owns and operates public passenger vehicles of the terminal vehicle category, as defined in Section 28-1 of the Ordinance; that it operates said motor vehicles on the public ways of the city for the transportation of passengers for hire from place to place within the corporate limits of the city, as provided in Section 28-2 of the Ordinance; that the Ordinance is a proper exercise of police power by the city in the interest of the safety, health and welfare of the public; that the federal government has not undertaken to regulate the subjects over which the city has thus exercised its police power; and that the Ordinance does not grant the city authorities an arbitrary right to refuse a terminal vehicle license (R. 158).

The Court of Appeals, without considering the present definition of "terminal vehicle," which has no relation by contract, or otherwise, to respondent railroads, held that section 28-31.1, limiting the number of terminal vehicles as public convenience and necessity require, in effect named Parmelee as the exclusive operator of motor vehicle service for the transfer of passengers between railroad terminals on through tickets calling for interstate transportation in Chicago (R. 206). The Court concluded that there is no valid legal basis for section 28-31.1 of the 1955 ordinance, and held the 1955 ordinance invalid as an interference with interstate commerce (R. 208). In support of its conclusion it cited the so-called legislative history of the Ordinance, to which reference has been made in the first point of our main brief, and which was more fully set forth in respondents' own argument in the District Court, excerpts from which appear in the appendix to this brief.

The city has contended, "The Ordinance does not purport, and cannot be construed, to preclude any railroad and steamship company from providing motor vehicles for the transfer of its passengers between terminal stations in the city upon through route tickets, subject to local regulation as may be lawfully imposed without conflict with federal authority" (Exerpts from Petition for Rehearing in Court of Appeals; Petitioner's brief on writ of certiorari, p. 26). In the light of these conflicts of interpretation of the Ordinance by respondents, the city, Parmelee, the District Court and the Court of Appeals, the statement of respondents that the Ordinance is clear, and that petitioner fails to point to any error in its construction in the courts below, lacks sincerity. Do respondents now claim that Chapter 28 is clearly applicable to their interstation transfer service, although they contended strenuously, both in the District Court and the Court of Appeals, that it is inapplicable to such service?

Neither *Togmer v. Witsell*, 334 U. S. 385, nor *Alabama Public Service Commission v. Southern Railway Co.*, 341 U. S. 341, cited in respondents' brief, pp. 16, 17, involved a constitutional question which depended on the interpretation of a state law or ordinance.

Morey v. Doud, 354 U. S. 457, cited by respondents under this point, concerned the validity of the Illinois Community Currency Exchange Act, excepting money orders of the American Express Company from the requirement that any firm selling or issuing money orders in the State must secure a license and submit to State regulation. The objection was that the exception is discriminatory in violation of the Fourteenth Amendment. There was no issue as to the construction of the Illinois Act. The State urged that if the exception is unconstitutional, the case should be remanded to the Illinois courts for a determination whether

the exception can be severed from the Act to sustain its constitutionality. This Court answered that in another case, the Supreme Court of Illinois clearly held that the exception is not severable.

We insist that Section 28-31.1, relating to public convenience and necessity, is applicable only to Parmelee's local transportation operations and to such other operations as may be licensed, subject to public convenience and necessity. It applies specifically to "terminal vehicles," as defined in Section 28-1 of the 1955 ordinance, and not to other public passenger vehicles," as defined in said section. It seems to us that the Court of Appeals determined that Transfer's operations are public passenger vehicles, subject to license and regulation by the city, but that the city cannot rely on economic considerations in determining whether to issue public passenger vehicle licenses to applicants engaged in the transfer of passengers in interstate commerce between railroad terminals in Chicago (R. 209). If the city's interpretation of the Ordinance were adopted, that Section 28-31.1 applies only to terminal vehicles, as carriers of passengers from railroad and steamship terminals to destinations within the limited area defined in Section 28-31, for cash fares, instead of on a through railroad or steamship ticket, such operation would be strictly a local transportation service subject to the provisions of Section 28-31.1, and the commerce clause of the U. S. Constitution would not be involved.

The statement of counsel for respondents that remission to the state courts in a controversy involving the construction of a city ordinance or the application of state law is not ordered unless demand for remission was made at the outset of the litigation, is not warranted by any decision of this Court. The rule has been adopted by this Court "for its own governance in cases confessedly within its

jurisdiction." *Rescue Army v. Municipal Court*, 331 U. S. 549.

In *Fieldcrest*, 316 U. S. 168, 172, this Court said: "the determination which the District Court, the Circuit Court of Appeals or we might make could not be anything more than a forecast—a prediction as to the ultimate decision of the Supreme Court of Illinois."

The decision of the Federal Courts as to the applicability of the Ordinance would not be binding on the State courts in the construction of the Ordinance. *Fieldcrest, supra*. Certainly the question whether the Supreme Court of Illinois will abide by the decision in this case is premature. The final decision of this Court will govern in a plea of *res judicata*.

3.

Resort to Legislative History.

We believe we have fully discussed this subject in Argument I of our main brief. Respondents have not distinguished the Illinois cases which we cited, as bearing directly on the facts in this case.

The cases cited by respondents are not applicable to gratuitous statements made by members of a committee of the city council or by the opinions of an attorney on the subject. Respondents have not shown that any statement contained in the so-called minutes of the local transportation committee was reported to the city council for consideration of the 1955 ordinance (R. 44). The statements of members of the committee or of the authors of an ordinance are not part of the legislative history in the city council, as journals of proceedings required by law or authority of the legislative body to be recorded and published.

Respondents' arguments, included in the appendix to this brief, prove that they did not consider the "minutes" as a reliable report of the statements made by counsel for the city at the meeting of July 21, 1955 (R. 91, 92).

4.

Validity of Section 28-31.1 Under the Commerce Clause.

We deem it unnecessary to reply to this point because, as we have abundantly demonstrated, in our main brief and in this reply, that the constitutional question presented should not be decided until an authoritative decision of Illinois courts is made as to the applicability of this section to the interstation transfer service, in the light of the constitutional objection herein presented.

Respectfully submitted,

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APPENDIX.

Excerpts from Plaintiffs' Reply Brief in the District Court not in the printed record and certified to this Court by the Clerk of the Court of Appeals.

Page 5. * * *

The Court's attention is directed to Plaintiffs' Exhibits 3, 4, 5 and 7. The City Clerk's certified copy of the Minutes of the July 21, 1955, Meeting of the Transportation Committee (Pl. Ex. 5) represents some unknown person's version of what was supposed to have taken place at that meeting with regard to the Abandoned Amendment and the July 26, 1955 Amendment. This version omits the decisive facts on the intended purpose and the intended scope of the July 26, 1955 Amendment which have a decisive influencing significance on the issue of the nonapplicability of that Amendment to plaintiffs' operations presented by the Complaint, as set forth below in Section B.

Pages 8-11. * * *

6. The July 26, 1955 Amendment was drafted by the Special Assistant Corporation Counsel who appeared for the City in these proceedings to carry out the intention of the Transportation Committee to preserve for Parmelee's terminal vehicles, otherwise disqualified for lack of qualifying factors, limited loop area passenger transportation business as a separate category of public passenger vehicles for hire, with distinctive features not then prevailing in the case of the other categories of public passenger vehicles for hire licensed and regulated by the Ordinance. The terminal vehicles operating under the Ordinance, as amended by the July 26, 1955 Amendment, with such distinctive features were characterized by Parmelee itself as "terminal vehicles which are special forms of taxis or hacks operating commercially over city streets" (Intervenor's Memorandum in Opposition to

Motion for Temporary Injunction (hereinafter referred to as Parmelee's Memorandum), p. 6).

The July 21, 1955 Transportation Committee Meeting proceedings are set forth in Pl. Ex. 4 filed on November 21, 1955, from which the following quotations are pertinent at this point:

Mr. Grossman: The ordinance that was presented to me for consideration yesterday, or the day before yesterday, I examined very carefully, and I don't think that it is within the corporate power of the City of Chicago, but the objective can be obtained in some other way, I think, without conflicting with our charter powers, and I had a conference with some of the members this afternoon, and proposed an approach which I think we can work out between now and the next meeting of the City Council.

Chairman Sheridan: Is there anybody who wants to comment on this or add anything to the discussion?

Alderman Holman: One question. Do I understand that terminal vehicles embrace those vehicles that operate between railroad stations?

Chairman Sheridan: Yes.

Alderman Holman: Is it limited to that?

Mr. Grossman: No, it is not. The operation from the railroad stations to points within the central business district, which is defined as the area bounded on the North by Ohio Street and on the South by Roosevelt Road, and the Lake on the East and Canal Street on the West. It is in the railroad terminal area, but it isn't necessarily between railroad stations. It may go from railroad stations to hotels and from hotels to railroad stations. That is the operation.

Alderman Holman: Thank you.

Mr. Grossman: And that operation can be continued by amendments to the present ordinance without conflicting with any of the statutory provisions.

Chairman Sheridan: Will you be kind enough to get that prepared for us?

Mr. Grossman: Yes.

Alderman Johnson: May I ask a question.

Chairman Sheridan: Yes.

Alderman Johnson: These vehicles carry passengers or baggage?

Mr. Grossman: This is public passenger vehicles.

Alderman Johnson: The old system where you get off the train and go to the hotel?

Mr. Grossman: Yes.

Alderman Burke: Is this a service that has been available to the travellers for some 60, 70 or 80 years?

Chairman Sheridan: It is my understanding they have been in existence in the City of Chicago for 103 years.

Pages 14-15. * * *

8. There is nothing in the record to justify a construction of the Ordinance, as Parmelee contends, to make terminal vehicle operation applicable to Transfer's operations. Such a conclusion could be justified only if it is presumed that the City authorities who drafted and passed the July 26, 1955 Amendment deliberately disregarded the relation of such service to the through railroad transportation service of which it is an integral part and as to which the Courts in the above cited cases have taken judicial notice as being matters of common knowledge.

The requirements of current railroad operation in through passenger transportation using Chicago as a junction point are set forth in Exhibit A attached to the Motion for Temporary Restraining Order, and the requirements for high-grade, safe and satisfactory Coupon holder interstation transfer service within the limited time available therefor are set forth in the Agency Contract, Exhibit A attached to the Complaint. In the face of such evidence, any construction of the Ordinance by Parmelee in behalf of its own interests

namely, that the Ordinance, including the July 26, 1955 Amendment, has application to Transfer's operations—is utterly unwarranted.

Page 54.

V.

Answers to the Motion of Defendants for Summary Judgment.

The defendants have filed a motion for summary judgment which in effect asks certain questions. The plaintiffs' foregoing argument deals fully with the subject matter of all such questions. It is submitted that the questions should receive the following answers:

Questions 2 and 3: Yes.

All other questions: No.

Conclusion.

The foregoing shows clearly that plaintiffs are entitled to a preliminary injunction restraining the defendants as now provided in the temporary restraining order.

Respectfully submitted,

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1957

No. ~~233~~

103

CITY OF CHICAGO, A MUNICIPAL CORPORATION,

Petitioner,

vs.

THE ATCHISON, TOPEKA AND SANTA FE
RAILWAY COMPANY, ET AL.,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1956

No. 905

CITY OF CHICAGO, A MUNICIPAL CORPORATION,
Petitioner,
vs.

THE ATCHISON, TOPEKA AND SANTA FE
RAILWAY COMPANY, ET AL.,
Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

DECISIONS BELOW

The opinion of the District Court is reported in 136 F. Supp. 476. For opinion, findings and conclusions see Tr. 99-112, 151-160¹.

The opinion of the United States Court of Appeals for the Seventh Circuit is reported in 240 F. 2d 930 and is printed in appendix to petition, pp. 37-54.

¹ Copies of the printed transcript of record and the printed briefs of the parties filed in the Court of Appeals are filed here and are called "Tr." and "briefs." The appendices to the petition for certiorari are called "app. to pet."

STATUTES AND ORDINANCES INVOLVED

The Illinois statutes enumerated in the first paragraph of petitioner's "Statutes and Ordinances Involved," p. 3, and summarized p. 13, are not in any way involved in this case. No issues as to those statutes ever have been in this case.

The case involves only § 28-31.1 of Chapter 28 of the Chicago Municipal Code (app. to pet. pp. 34-35) and § 302 (c) (2) of Title 49, U. S. Code, set out in part in the opinion of the Court of Appeals (app. to pet. pp. 45-46) and in full in the appendix to this brief, p. 19. Section 302 (c) (2) is involved only incidentally here since petitioner is not seeking review of the construction of § 302 (c) (2) by the Court of Appeals.

STATEMENT OF THE CASE

The basic issue and the precise holding of the Court of Appeals are not made clear in the petition for certiorari. The first paragraph of "Reasons for Granting the Writ," p. 6, states that the Court of Appeals has held invalid "a most salutary city ordinance * * * for the protection of public health and safety, and for public convenience." The petition seems to imply, by the relation of the foregoing to the reference at the top of page 4, that all of Chapter 28 of the Chicago Municipal Code, insofar as it relates to "Terminal Vehicles," was held invalid. But this is not correct. Only § 28-31.1 of Chapter 28 (app. to pet. pp. 34-35) was held invalid. See the Court's Opinion (app. to pet. pp. 50-54). This section was added to Chapter 28 by the City Council on July 26, 1955 (Tr. 44-45). The Court's opinion leaves in effect all of the ordinance except § 28-31.1; it leaves in effect all of the provisions that Chapter 28 ever had "for the protection of public health and safety," covering most of pages 15 to 36 of appendix

to the petition. The sole issue is the constitutional validity of § 28-31.1, pp. 34-35.

The petition does not show how Chapter 28 was amended on July 26, 1955. This Chapter had been in effect for some years prior to that date. The amendment of July 26, 1955, added § 28-31.1 and changed the definition of "terminal vehicle" (Tr. 44-45). Before the amendment "terminal vehicle" was defined as follows (separate brief of appellant railroad companies, appendix p. 3):

"'Terminal vehicle' means a public passenger vehicle which is operated under contracts with railroad and steamship companies, exclusively for the transfer of passengers from terminal stations. [Passed. Coun. J. 12-20-51, p. 1596; amend. 1-30-52, p. 1921; 12-30-52, p. 3905.]"

The amendment changed it to read (Tr. 44):

"'Terminal vehicle' means a public passenger vehicle which is operated exclusively for the transportation of passengers from railroad terminal stations and steamship docks to points within the area defined in section 28-31. [Passed. Coun. J. 12-20-51, p. 1596; amend. 1-30-52, p. 1921; 12-30-52, p. 3905; 7-26-55, p. 897.]"

The amendment, changing the definition of "terminal vehicle" and adding § 28-31.1, was prepared at the direction of the Committee on Local Transportation of the Chicago City Council after the Committee had been advised by Parmelee Transportation Company that the Chicago railroads had arranged to discontinue the use of Parmelee for the interstation transfer of passengers as of September 30, 1955 (Tr. 90-95). The Committee recommended passage of the amendment (Tr. 95) and it was passed as recommended (Tr. 44-45).

Respondents deny the statement on page 7 of the petition that this action was instituted as a "friendly suit."

That has no basis of fact, and the record proves the contrary. For example, the District Court's judgment denied respondents all relief and held respondents subject to § 28-31.1 of Chapter 28 (Tr. 160). Petitioner did its utmost by its brief in the Court of Appeals to obtain affirmance of this judgment (appellee's brief).

ARGUMENT

1.

ANSWER TO PETITIONER'S FIRST AND EIGHTH "QUESTIONS PRESENTED FOR REVIEW."

Petitioner's first and eighth "questions presented for review", pp. 2, 3, may be considered together:

"1. Did the courts below properly entertain jurisdiction on the constitutional question involving control of interstate commerce, when the paramount issue presented by the pleadings involved the construction of a city ordinance governed by state law.

"8. Does Transfer operate 'terminal vehicles' as defined by the ordinance."

By "paramount issue" petitioner apparently means the issue whether the ordinance applies to respondents, for petitioner states in the last sentence of its argument, p. 12: "The basic question at issue between the city and the respondents is whether Transfer is a 'terminal vehicle' as that term is defined by the ordinance." (We do not agree. The paramount issue is the constitutional question. Tr. 6-7, 16-22, 103-108.)

Petitioner's questions 1 and 8 present no grounds for certiorari; indeed, these questions are not presented by the record. After the District Court entered its opinion (Tr. 99-112) petitioner filed proposed findings and conclusions that the ordinance applies to respondents and is valid, and a proposed judgment denying respondents' prayer for injunction (Tr. 117-122). The District Court held in accord with such proposals (1) that the ordinance is applicable to respondents, and (2) that the ordinance is constitutionally valid, and dismissed the action. (Tr. 155-160). Respondents appealed. Petitioner vigorously urged the Court of Ap-

peals to sustain the District Court on both of the above points (appellees' brief). On the point of applicability petitioner told the Court of Appeals in part (appellees' brief pp. 12-13):

"That the framers of the ordinance in question intended to regulate the business carried on by Transfer wholly within the City of Chicago is hardly subject to challenge. Appellants have themselves made pointed reference to the legislative history (R. 92), and the language of the ordinance leaves no room for doubt. For among the list of motor vehicles carrying passengers for hire which are made subject to the terms of the ordinance are '*terminal vehicles*'. A '*terminal vehicle*' is defined in the ordinance as 'a public passenger vehicle which is operated exclusively for the transportation of passengers from railroad terminal stations and steamship docks to points within the area' bounded on the north by Ohio Street, on the west by Desplaines Street, on the south by Roosevelt Road, and on the east by Lake Michigan. Chicago Municipal Code, c. 28; §§ 28-1, 28-31. All of the railroad terminal stations are within this area. *A more accurate description of the business engaged in by Transfer would be hard to find.*" (Emphasis added)

The Court of Appeals held the ordinance applicable to respondents (app. to pet. pp. 47-48, 51-52) but held § 28-31.1 invalid because in conflict with the Interstate Commerce Act and the Commerce Clause (pp. 52-54).

It is therefore clear that the courts below did "properly entertain jurisdiction on the constitutional question", after having first held the ordinance applicable to respondents in accordance with petitioner's earnest prayers to that end. Thus there is no merit in petitioner's first question.

By the eighth "question presented", in connection with the first question, petitioner apparently is asking this Court to grant certiorari to review the issue of applicability despite the fact that that issue was decided in petitioner's

favor in both courts below. Petitioner is attempting, pp. 6-7, to invoke the principle that in a proper case, and irrespective of the positions of the parties, this Court can notice and rule upon a non-constitutional issue in order to avoid decision of a constitutional question. But this case cannot conceivably call for the application of that principle.

Petitioner does not make any showing whatsoever that a hearing in this Court on the question of applicability might produce a decision different from the two decisions already had in petitioner's favor on this issue in the two courts below. In that respect alone petitioner falls far short of stating a case for certiorari. We do not overlook petitioner's observations in respect to the definition of "terminal vehicle" stated in pages 8-11. These set forth no arguments of substance, and insofar as any clear statements can be gleaned from them they are totally demolished by petitioner's argument to the Court of Appeals set out above in this brief, p. 6.

Petitioner's extraordinary request calls for forthrightness that petitioner does not offer. If certiorari were granted would petitioner argue in this Court that Chapter 28 does not apply to respondents? No answer to that is supplied. If such an argument were made how could it be reconciled with the solemn assurances given the Court of Appeals, over the signature of petitioner's chief law officer, that Chapter 28 does apply? (appellees' brief, pp. 12-13). How could petitioner or its law officers answer the questions: "On which occasion were you serious? Will you switch your construction again when you deem it convenient?" Or, if petitioner wants certiorari in order to argue in this Court that Chapter 28 does apply, what is to be gained when the courts below have already so held?

The basic reason why this Court sometimes examines or re-examines a question of applicability of a statute where

a constitutional issue is involved, irrespective of the positions of the parties, does not come into play here. A decision of a Federal Court in Florida holding a Federal statute invalid may have important results in Oregon upon unrepresented interests. But here there is an ordinance of the City of Chicago, and in both courts below the Chief Law Officer of the City, and the Mayor, both parties below, officially advised the Courts that the ordinance is applicable to respondents and vigorously urged the Courts to accept that construction (Tr. 117-122; appellees' brief, pp. 12-13). Assuredly no principle calls for certiorari to permit the City to take a different position now. *City and County of Denver v. Denver Tramway Corporation*, 23 F. 2d 287, 296, C. C. A. 8th (1927), cert. den. 278 U.S. 616.

2.

ANSWER TO PETITIONER'S SECOND QUESTION

Petitioner states:

"2. Should the courts below have decided the non-constitutional question of the applicability or meaning of the ordinance instead of remitting the parties to the state courts for determination of that question."

This is the first time in this case that anyone has suggested this procedure. No case is pending in the state courts. The District Court had discretion in the first instance whether to remit the parties to the Illinois Courts for the decision of questions of Illinois law, if there were any, or whether to retain that issue. *Doud v. Hodge*, 350 U.S. 485, 487 (1956); *Propper v. Clark*, 337 U.S. 472, 492 (1949). Petitioner filed in the District Court proposed findings of fact and conclusions of law that the ordinance was applicable to respondents and was valid (Tr. 117-122). The District Court so held (Tr. 154-160). Petitioner made no suggestion to the Court of Appeals that there existed any issue of Illinois law which should be remitted to the Illinois

Courts (appellees' brief). Petitioner did not present this question in its petition for rehearing (see copy). It is now too late for petitioner to raise the question. *C.ST.P.M.&O. Ry. Co. v. United States*, 322 U.S. 1, 3-4 (1944); *Propper v. Clark, supra*, 337 U.S. 472, 492; *Doud v. Hodge, supra*, 350 U.S. 485, 487.

In any event, however, no occasion has ever existed in the progress of this case that would permit remitting any issue to the Illinois Courts. The principal issues of law arise out of the construction of Federal statutes. The only questions of Illinois law in the case are either self evident on their face or already firmly settled by decisions of the Supreme Court of Illinois. Under these circumstances this Court does not remit issues to state courts.

FEDERAL STATUTES INVOLVED

The interstation transfer service is being performed under the authority of 49 U.S.C. § 302(c)(2) as to more than 99 per cent of the transfers (Opinion of the Court of Appeals, app. to pet. pp. 45-47, 39, 43-44). Petitioner does not take exception to the conclusions of the Court of Appeals in respect to the rights conferred upon respondents by § 302(c)(2) (app. 47-52). Specifically, for one example, petitioner does not except to the Court's conclusions (app. 51) that by force of § 302(c)(2) petitioner has no power to deny or suspend the rights of respondents to operate the interstate portion of the transfer service. Petitioner has not asked the Court to review that conclusion. This Court commented on the rights given to the railroads by § 302(c) in *Interstate Commerce Commission v. Parker*, 326 U.S. 60, 67-68 (1945).

THE CONSTRUCTION OF "TERMINAL VEHICLE"

Petitioner fails to present any argument that there is any uncertainty in the definition of "terminal vehicle" in the

ordinance or that Illinois courts would give the definition a construction different from that of the two courts below.

The definition is (app. to pet. p. 16):

"Terminal vehicle" means a public passenger vehicle which is operated exclusively for the transfer of passengers from railroad terminal stations and steamship docks to points within the area defined in section 28-31."

In respect to that definition petitioner told the Court of Appeals (appellees' brief pp. 12-13):

"A 'terminal vehicle' is defined in the ordinance as 'a public passenger vehicle which is operated exclusively for the transportation of passengers from railroad terminal stations and steamship docks to points within the area' bounded on the north by Ohio Street, on the west by Desplaines Street, on the south by Roosevelt Road, and on the east by Lake Michigan. Chicago Municipal Code, c. 28 §§ 28-1, 28-31. All of the railroad terminal stations are within this area. A more accurate description of the business engaged in by Transfer would be hard to find."

The definition of "terminal vehicle" before the amendment of July 26, 1955, was (appendix to separate brief of appellant railroads, p. 3):

"'Terminal vehicle' means a public passenger vehicle which is operated under contracts with railroad and steamship companies exclusively for the transfer of passengers from terminal stations."

This definition had covered the Parmelee interstation transfer service for the railroads for many years, so petitioner told the Court of Appeals (appellees' brief, p. 12). The new definition lacks the requirement of a contract with the railroads, but it is even more descriptive of the transfer of passengers between stations than the former definition, in that under the present definition the area of operation

is restricted to the area of railroad stations. Both the old and new definition cover the transportation of railroad passengers from terminal stations. The new definition restricts the destination to an area narrowly bounding all the stations involved. On its face the definition clearly includes respondents and petitioner has always so contended until now.

In a case involving a serious question of construction of a state statute this Court accepted the construction contended for by the state authorities in the District Court and held the act unconstitutional under that construction. *Thompson v. Consolidated Gas Utilities Corp.*, 300 U.S. 55 76 (1937). The instant case is much stronger than that one, because no showing has been made by petitioner that an Illinois Court would give the clear terms of the definition of "terminal vehicle" any other meaning than that given by the courts below.

In *Propper v. Clark*, *supra*, 337 U.S. 472, 492, the Court said:

"The submission of special issues is a useful device in judicial administration in such circumstances as existed in the *Magnolia Case*, 309 U.S. 478; *Spector Case*, 323 U.S. 101; *Fieldcrest Case*, 316 U.S. 168; and the *Pullman Case*, 312 U.S. 496, all *supra*, but in the absence of special circumstances, 320 U.S. at 236, 237, it is not to be used to impede the normal course of action where federal courts have been granted jurisdiction of the controversy."

There are no "special circumstances" in this case which would authorize any procedure looking to remission of this case to the state courts. Instead, all of the circumstances, ordinary and special, are against that procedure.

THE CONSTRUCTION OF "PUBLIC CONVENIENCE AND NECESSITY"

It is not clear whether petitioner contends that the construction of "public convenience and necessity" in § 28-31.1 of Chapter 28 (app. to pet. p. 35) ought to be remitted to Illinois courts. This phrase has a fixed meaning in Illinois law, established by decisions of the Supreme Court of Illinois construing the phrase in the Illinois Public Utilities Act, Ill. Rev. Stat., 1953, Ch. 111½, § 56, Laws of 1913, p. 460, Laws of 1921, p. 731. See Appendix hereto p. 20. This construction is binding on the Federal courts.

The Illinois Court holds uniformly that this phrase includes only economic regulation of carrier service, such as the determination of which one of two or more competitors shall be selected to perform the service, protection of an established carrier against the entry of new competition, determination of economic benefit to the public, and similar purely economic considerations.²

Section 28-30.1 of Chapter 28 (app. to pet. pp. 34-35) was copied from § 28-22.1 of Chapter 28 (pp. 29-30). Section 28-22.1 regulates taxicabs. In *Yellow Cab Co. v. City of Chicago*, 396 Ill. 388, 71 N.E. 2d 652 (1947), it was held that "public convenience and necessity" in § 28-22.1 of Chapter 28 comprehends the power to limit the number of taxicab licenses to avoid the economic distress among taxicab operators that would be caused by an over-supply of taxicabs.

² *Egyptian Transportation System v. Louisville and Nashville R.R. Co.*, 321 Ill. 580, 587-588, 152 N.E. 510, 512-513 (1926); *Eagle Bus Lines, Inc. v. Illinois Commerce Commission*, 3 Ill. 2d 66, 119 N.E. 2d 915 (1954); *Chicago & West Towns Railways, Inc. v. Illinois Commerce Commission*, 383 Ill. 20, 43 N.E. 2d 320 (1943); *Bartonville Bus Line v. Eagle Motor Coach Line*, 326 Ill. 200, 157 N.E. 175 (1927); *Illinois Power & Light Corp. v. Commerce Commission*, 320 Ill. 427, 151 N.E. 326 (1926); *The Commerce Commission v. Chicago Railways Company*, 362 Ill. 559, 566, 1 N.E. 2d 65, 68-69 (1936).

It is clear from the minutes of the meetings of July 21, 1955, and July 26, 1955, of the Committee on Local Transportation of the Chicago Council (Tr. 93-96) that the Committee intended to impose "public convenience and necessity" regulation upon the successor of Parmelee Transportation Company in the interstation transfer of passengers, that is, upon the operator of "terminal vehicles." This shows the plain legislative intent, if it needs so to be shown, that "terminal vehicle" includes respondents' transfer service.

Under the Illinois decisions above cited, "public convenience and necessity" means economic regulation that is beyond the power of the states as to Interstate Commerce. *Buck v. Kykendahl*, 267 U.S. 307, 315-316 (1925).

ANSWER TO PETITIONER'S THIRD QUESTION

Petitioner states, p. 3:

"3. Does the record support the conclusion of the Court of Appeals that counsel for the city who drafted the ordinance, as a substitute for a proposed special franchise to Parmelee Transportation Company (hereafter 'Parmelee'), objected to the form and not to the substance of the ordinance first proposed."

The petition fails to reveal that the suggested error would be prejudicial. However, it is clear that there is no error.

Petitioner's own official record of what transpired in the meeting of the Committee on Local Transportation of July 21, 1955, is the following from the Committee's minutes, duly certified as a true and correct official record of petitioner by petitioner's city clerk (Tr. 94):

"Mr. Grossman, who was present at the request of the committee, stated that he had looked over the

ordinance as introduced by Chairman Sheridan and is of the opinion that the ordinance is not in proper form; but that he believes the objective can be obtained in some other way. He said he would endeavor to prepare and submit an ordinance on this subject to the committee before the next meeting."

These minutes are "the only lawful evidence of the action to which they refer." (*Western Sand & Gravel Co. v. Town of Cornwall*, 2 Ill. 2d 560, 564, 119 N.E. 2d 261, 264 (1954)). The minutes were introduced in evidence on November 21, 1955 (Tr. 93), and were not objected to in any manner until after the decision of the Court of Appeals on January 17, 1957.

We submit that petitioner cannot object to the Court's quoting petitioner's own official record.

A reporter's transcript of the meeting of July 21, which is not identified as a record of petitioner, contains the following (Tr. 91):

"Mr. Grossman: The ordinance that was presented to me for consideration yesterday, or the day before yesterday, I examined very carefully, and I don't think that it is within the corporate power of the City of Chicago, but the objective can be obtained in some other way, I think, without conflicting with our charter powers, and I had a conference with some of the members this afternoon, and proposed an approach which I think we can work out between now and the next meeting of the City Council."

We submit that an ordinance that is not "within the corporate power" is "not in proper form," and we submit any difference in any event is *de minimis*.

4.

ANSWER TO PETITIONER'S FOURTH QUESTION

The Court of Appeals stated no such conclusion as the one attacked. Petitioner does not attempt to point to any

such conclusion in the Court's opinion. Petitioner apparently is here referring to its own official committee minutes (Tr. 93-96) which were quoted in part by the Court of Appeals (app. to pet. pp. 42, 43, 50-51).

5.

ANSWER TO PETITIONER'S FIFTH QUESTION

Petitioner states:

"5. Was the Court of Appeals justified in considering the motives of any member or members of the city council to determine the meaning, purpose or effect of the ordinance."

Petitioner argues, p. 11, that "it is not the function of the Federal Courts to question the motives of a legislative body."

Petitioner's argument and authorities are not apposite. The cases cited did not involve the well-established principle of the right and duty of the courts to resort in a proper case to the materials of legislative history to ascertain legislative intent. The rule applicable here is stated in several harmonious Illinois and Federal decisions.

In *City of Rockford v. Schultz*, 296 Ill. 254, 257, 129 N.E. 865, 866 (1921), the Court said, in words closely applicable to the instant case:

"The object in construing a statute is to ascertain and give effect to the legislative intent, and to that end the whole act, the law existing prior to its passage, any changes in the law made by the act, and the apparent motive for making such changes, will be weighed and considered." (Emphasis added.)

There the Supreme Court of Illinois resorted to the report of a special committee of the legislature to ascertain "the apparent motive" in amending a statute.

In *Dean Milk Co. v. Chicago*, 385 Ill. 565, 570, 53 N.E. 2d 612, 615 (1944), the Court said:

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ARGUMENT

1.

THE QUESTION OF THE APPLICABILITY OF THE ORDINANCE IS NOT BEFORE THE COURT

In both Courts below petitioner obtained judgments requested by petitioner that Chapter 28 of the Chicago Municipal Code is applicable to respondents' interstation transfer operation. Petitioner cannot now take the position that the Courts below erred in agreeing with petitioner or that the question is open for decision 13

2.

NO OCCASION EXISTS FOR REMISSION OF ISSUES TO ILLINOIS COURTS

Petitioner makes no attempt to point to any ambiguity in Chapter 28, and none exists. The ordinance is clear and petitioner fails to point to any error in its construction by the Courts below. No occasion exists for remission of issues to the Illinois Courts 16

3.

RESORT TO LEGISLATIVE HISTORY WAS PROPER

Section 28-31.1 is invalid on its face, and the Court of Appeals so held without resort to legislative history. But petitioner argued that the words of § 28-31.1 should be given a meaning different from that accorded them by the Supreme Court of Illinois and by this Court. To consider that argument the Court looked to the report of The City Council Committee recommending § 28-31.1 for passage. It should be

noted that the Court did not resort to legislative history to determine whether the ordinance is applicable to respondents, and petitioner is in error in so alleging.

19

SECTION 8-31.1 IS INVALID UNDER THE COMMERCE CLAUSE.

The interstate transportation service is being performed by the railroads as railroad transportation subject to Part 4 of the Interstate Commerce Act by force of 49 U.S.C. § 302(c)(2). It is performed pursuant to tariffs filed with the Interstate Commerce Commission and is regulated by the Commission. The Federal acts under which the service is performed conflict with 28-31.1 of Chapter 28 and render it invalid.

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Conclusion

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House of Representatives Report No. 31, 38th Congress, 1st Sess.

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Telegraph Act of 1866, 14 Stat. 224, 47 U.S.C. § 150.

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Illinois Public Utilities Act, 55; Illinois Revised Stat.

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"The rules for the construction of an ordinance are the same as those applied in the construction of a statute."

The Court considered a large amount of extrinsic legislative history and testimony of expert witnesses to determine the meaning of the ordinance, citing the foregoing as justification for such procedure.

In *People v. Olympic Hotel Bldg. Corp.*, 405 Ill. 440, 445, 91 N.E. 2d 597, 600 (1950), the Court said:

"Resort to explanatory legislative history has been declared not to be forbidden no matter how clear the words may first appear on superficial examination. (*Harrison v. Northern Trust Co.*, 317 U.S. 476.)"

In the case cited in the foregoing excerpt this Court made the statement attributed to it in consulting the report of a committee.

In *Boshuizen v. Thompson & Taylor Co.*, 360 Ill. 160, 163, 195 N.E. 625, 626 (1935), the Court said:

"For the purpose of passing upon the construction, validity or constitutionality of a statute the court may resort to public official documents, public records, both State and national, and may take judicial notice of and consider the history of the legislation and the surrounding facts and circumstances in connection therewith."

The materials of legislative history here used were petitioner's own "public official documents," the minutes of the Committee on Local Transportation (Tr. 93-96). They are "the only lawful evidence of the action to which they refer." *Western Sand & Gravel Corp. v. Town of Cornwall*, 2 Ill. 2d 560, 564, 119 N.E. 2d 261, 264 (1954). The minutes of July 21 and July 26, 1955, should of course be considered together. While this legislative history seems clearly relevant at all times under the authorities above cited, it would

become so under the narrowest possible construction of the principle of resort to extrinsic history by reason of petitioner's argument. Petitioner made an extensive argument to the Court of Appeals that the phrase "public convenience and necessity" as used in the ordinance did not comprehend economic regulation but meant only what petitioner characterized as permissible police power regulation (appellees' brief pp. 52-58). The Court's opinion adverts to petitioner's argument in this respect (app. to pet. p. 49), and then cites the legislative history in response to it (pp. 50-51).

6.

ANSWER TO PETITIONER'S

SIXTH AND SEVENTH QUESTIONS

Petitioner states:

"6. Does the ordinance in effect give Parmelee perpetual control of terminal vehicle licenses in the City of Chicago, as indicated in the Opinion of the Court of Appeals.

"7. Does the ordinance, in effect, bar Railroad Transfer Service, Inc. (hereafter 'Transfer') from the entire network of highways within the downtown area of Chicago, as stated by the Court of Appeals."

We do not find any argument in support of these questions anywhere in the petition.

The Court's conclusions are plainly correct. Section 28-31.1 of Chapter 28 (app. to pet. pp. 34-35) authorizes the "annual renewal" of the existing Parmelee licenses without proof of public convenience and necessity. Section 28-8 (p. 19) provides for substantially automatic "annual renewal" of existing licenses. Section 28-31.1 was copied from the taxicab section, § 28-22.1, and the latter gave perpetual control of taxicab licenses to licenses under it. *Vel-*

low Cab Co. v. City of Chicago, 396 Ill. 388, 71 N.E. 2d 652 (1947). Section 28-31.1 would permit petitioner to limit the number of licenses to those held by Parmelee by declaring that no more licenses are required by the public convenience and necessity.

Such economic regulation of interstate commerce is not within state or city power. *Ruck v. Kuykendall*, 267 U.S. 307, 315-316 (1925). By requiring submission to such unlawful demands before engaging in interstate commerce petitioner has unconstitutionally barred Transfer from the Chicago streets. *Barrett (Adams Express Co.) v. New York*, 232 U.S. 14 (1914); *Michigan Public Utilities Comm. v. Duke*, 266 U.S. 570 (1925); *Smith v. Cahoon*, 283 U.S. 553 (1931); *Lovell v. Griffin*, 303 U.S. 444 (1938), citing *Smith v. Cahoon*, p. 453; *Sault Ste. Marie v. International Transit Co.*, 234 U.S. 333 (1914). Perhaps it should be noted that petitioner admitted that unless restrained it would enforce these unlawful demands (Tr. p. 6, par. 4; pp. 17-21; 71-72).

CONCLUSION

For the foregoing reasons the petition for writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX

SECTION 202 (c) OF THE INTERSTATE COMMERCE ACT. 49 U.S.C. § 302 (c).

(c) Notwithstanding any provision of this section or of section 203, the provisions of this part, except the provisions of ~~section 204~~ relative to qualifications and maximum hours of service of employees and safety of operation and equipment, shall not apply—

(1) to transportation by motor vehicle by a carrier by railroad subject to part I, or by a water carrier subject to part III, or by a freight forwarder subject to part IV, incidental to transportation or service subject to such parts, in the performance within terminal areas of transfer, collection, or delivery services; but such transportation shall be considered to be and shall be regulated as transportation subject to part I when performed by such carrier by railroad, as transportation subject to part III when performed by such water carrier, and as transportation or service subject to part IV when performed by such freight forwarder;

(2) to transportation by motor vehicle by any person (whether as agent or under a contractual arrangement) for a common carrier by railroad subject to part I, an ~~express~~ company subject to part I, a motor carrier subject to this part, a water carrier subject to part III, or a freight forwarder subject to part IV, in the performance within terminal areas of transfer, collection, or delivery service; but such transportation shall be considered to be performed by such carrier, express company, or freight forwarder as part of, and shall be regulated in the same manner as, the transportation by railroad, express, motor vehicle, or water, or the freight forwarder transportation or service, to which such services are incidental.

ILLINOIS REVISED STATUTES, 1955, CH. 111 $\frac{1}{2}$, § 56, LAWS OF 1913, P. 460, LAWS OF 1921, P. 731.

§ 55. *Certificate of convenience and necessity—Alteration.*

No public utility shall begin the construction of any new plant, equipment, property or facility, which is not in substitution of any existing plant, equipment, property or facility or in extension thereof or in addition thereto, unless and until it shall have obtained from the Commission a certificate that public convenience and necessity require such construction.

No public utility not owning any city or village franchise nor engaged in performing any public service or in furnishing any product or commodity within this State and not possessing a certificate of public convenience and necessity from the State Public Utilities Commission or the Public Utilities Commission, at the time this Act goes into effect, shall transact any business in this State until it shall have obtained a certificate from the Commission that public convenience and necessity require the transaction of such business.

Whenever after a hearing the Commission determines that any new construction or the transaction of any business by a public utility will promote the public convenience and is necessary thereto, it shall have the power to issue certificates of public convenience and necessity:

Office Supreme Court U.S.

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OCT 21 1957

JOHN T. FEY, Clerk

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1957

No. 103

CITY OF CHICAGO, A MUNICIPAL CORPORATION,
Petitioner,

THE ATCHISON, TOPEKA AND SANTA FE
RAILWAY COMPANY, ET AL.,
Respondents.

On Writ of Certiorari to the United States Court
of Appeals for the Seventh Circuit

RESPONDENTS' BRIEF

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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1957

No. 103

CITY OF CHICAGO, A MUNICIPAL CORPORATION,
Petitioner,

vs.

THE ATCHILSON, TOPEKA AND SANTA FE
RAILWAY COMPANY, ET AL.,
Respondents.

On Writ of Certiorari to the United States Court
of Appeals for the Seventh Circuit

RESPONDENTS' BRIEF

QUESTIONS PRESENTED

1. Since petitioner was successful in both Courts below in obtaining judgments, requested by it, that Chapter 28 of the Chicago Municipal Code is applicable to respondents, may petitioner now contend in this Court that the Courts below erred in granting the judgments requested by petitioner; and may petitioner now contend that the question of applicability is open for decision.
2. Where petitioner makes no attempt to show ambiguity in Illinois law; where the Illinois law is clear and needs no construction; and where the only substantial question

is one of Federal law, does any occasion exist for remission to Illinois courts.

3. Where petitioner argues that an ordinance has a meaning different from its plain terms, whether resort can be had to legislative history for the purpose of showing that the ordinance means what it says.

4. May petitioner forbid respondent railroads to engage in interstate commerce authorized by federal statutes unless the railroads prove to petitioner's satisfaction that public convenience and necessity requires such interstate commerce.

STATEMENT OF THE CASE

The statements of the case in Nos. 103 and 104 are identical except as to the first paragraph of each entitled "the parties."

THE PARTIES

Respondents are the 21 railroads having passenger terminals in Chicago and Railroad Transfer Service, Inc., with whom the railroads have a contract for the interstation transfer of passengers in Chicago (R. 25-43). For brevity and clarity they will hereafter sometimes be called the railroads and Transfer. Respondents sued petitioner and its officials in the United States District Court for declaratory judgment that a recently amended ordinance regulating transfer of passengers between Chicago stations is invalid under the Commerce Clause, and for injunction against its enforcement (R. 4-54). Parmelee Transportation Company was granted leave to intervene as a defendant under Rule 24(h) over the objections of respondents (R. 58-61, 65-68). Petitioner moved for summary judgment which was granted, and the Court dismissed the complaint (R. 71-72, 99-112, 155-160). The Court of Appeals held the ordinance applicable and valid except as to one section which the Court held invalid under the Commerce Clause (R. 196-213).

INTERSTATION TRANSFER OF RAILWAY PASSENGERS IN CHICAGO

For many years the railroads have provided by tariffs for transfer of through passengers and their baggage between downtown Chicago stations. There are eight passenger terminals in downtown Chicago, each being used by from one to six railroads (R. 7). No one railroad passes through Chicago, but a very large number of railroad passengers travel through Chicago every day whose continuous

journeys begin and end at points outside of Chicago, and these transfer at Chicago from the incoming to the outgoing railroad (R. 7-8, 48-49). Approximately 3900 per day of these passengers transfer between incoming and outgoing railroads that are located in different terminal stations (R. 49). The only practical method of transferring these passengers is by motor vehicle equipped to carry such passengers and their accompanying hand baggage simultaneously (R. 7-9, 49). More than 99 per cent of the passengers so transferred between different terminal stations are traveling on through tickets between origin and destination points located in different states (R. 7, 49), and their transfer is therefore interstate commerce (R. 202).

This through transportation from origin to destination via different railroads through Chicago is provided pursuant to tariffs filed with the Interstate Commerce Commission and with the Illinois Commerce Commission (R. 7-8, 74-79, 190-195). Under applicable tariffs the through passenger transportation service includes any required passenger and baggage transfer service from the terminal station in Chicago of the incoming line to the terminal station in Chicago of the outgoing line (R. 8-9).

Pursuant to such tariffs a passenger traveling through Chicago purchases at his point of origin a railroad ticket composed of a series of coupons covering his complete transportation to his destination (R. 8, 49). If his through journey requires him to transfer from one railroad passenger terminal in Chicago to another, a part of his ticket consists of a coupon good for the transfer of himself and his baggage between such terminals (R. 8-9, 49). The tariffs provide that any such required transfer service shall be without additional charge where the fare exceeds a low minimum (R. 8, 74-79, 190-195). The expense of the transfer service is absorbed by the railroads (R. 8).

Upon arrival in Chicago the through passenger delivers the transfer coupon to the railroad's transfer agent, whereupon the transfer agent carries the passenger and his baggage from the incoming to the outgoing station without further charge (R. 26-29). The transfer agent is compensated by a specified payment to it per coupon by the outgoing terminal railroad (R. 29-31).

REGULATION OF THE INTERSTATION TRANSFER SERVICE BY THE CITY OF CHICAGO

The City of Chicago has regulated the interstation transfer vehicles for many years by Chapter 28 of the Chicago Municipal Code. This chapter regulates all "public passenger vehicles" and includes the transfer vehicles which it defines as "terminal vehicles." Prior to July 26, 1955, terminal vehicles were covered only by §§ 28-1 to 28-18, 28-31, and 28-32 of Chapter 28 (R. 171-189). These sections of Chapter 28 are not in issue, having been found applicable and valid by the Court of Appeals (R. 208-209, 200). They require a license for identification and regulation (R. 173, 174, 177 §§ 28-2, 28-5, 28-10, 28-11), an annual license fee (R. 175 § 28-7), observance of safety regulations (R. 173, 174, 181 §§ 28-4, 28-4.1, 28-17), and carrying insurance (R. 178 § 28-12). These provisions may be enforced by suspension or revocation of the license and by fines for violations (R. 179, 180, 189 §§ 28-14, 28-15, 28-32; R. 208-209).

On June 13, 1955, the railroads announced that effective October 1, 1955, they were discontinuing their arrangements with Parmelee Transportation Co. for performance of the transfer service and had made a contract with Railroad Transfer Service, Inc., for this purpose (R. 82, 25-43). Parmelee so informed the Chairman of the Committee on Local Transportation of the Chicago City Council, and on June 16, 1955, the Chairman introduced a proposed ordi-

nance which would give Parmelee an exclusive ten-year franchise to perform interstation transfer service (R. 85-89, 44, 93-95, 201 footnote 12 and related text). The Committee on Local Transportation considered the matter on July 24, 1955, and laid the proposed ordinance aside (R. 90-95); but on July 26, 1955, the Committee recommended an amendment of Chapter 28 to the Council for passage (R. 95) and it was passed the same day (R. 44-45).

This amendment (R. 44-45) made two material changes in Chapter 28: (1) It changed the definition of terminal vehicle so as to remove a previously existing requirement that a terminal vehicle operator must have a contract with railroads. (2) It gave Parmelee permanent terminal vehicle licenses for all of its vehicles and it provided that before the railroads and Transfer may operate any terminal vehicles they must prove that public convenience and necessity requires such operation.

Thus before the amendment "terminal vehicle" was defined as follows (R. 172, 188, 189):

"'Terminal vehicle' means a public passenger vehicle which is operated under contracts with railroad and steamship companies, exclusively for the transfer of passengers from terminal stations."

"28-31. No person shall be qualified for a terminal vehicle license unless he has a contract with one or more railroad or steamship companies, for the transportation of their passengers from terminal stations."

"It is unlawful to operate a terminal vehicle for the transportation of passengers for hire except for their transfer from terminal stations to destinations in the area bounded on the north by E. and W. Ohio street; on the west by N. and S. Desplaines street; on the south by E. and W. Roosevelt Road; and on the east by Lake Michigan."

These provisions were changed by the July 26, 1955, amendment to read as follows (R. 44-45):

"Terminal vehicle' means a public passenger vehicle which is operated exclusively for the transportation of passengers from railroad terminal stations and steamship docks to points within the area defined in Section 28-31."

"28-31 Terminal Vehicles) Terminal vehicles shall not be used for transportation of passengers for hire except from railroad terminal stations and steamship docks to destinations in the area bounded on the north by E. and W. Ohio Street; on the west by N. and S. Desplaines Street; on the south by E. and W. Roosevelt Road; and on the east by Lake Michigan."

Thus the requirement of a contract with the railroads was removed from the definition by the amendment. The area of operation defined in both the repealed and the new sections just includes the eight downtown railroad stations.

The grant of permanent licenses to Parmelee and the requirement that the railroads and Transfer prove public convenience and necessity before operating any vehicles were accomplished by adding to Chapter 28 a new section, 28-31.1 (R. 44-45):

"28-31.1 Public Convenience and Necessity) No license for any terminal vehicle shall be issued except in the annual renewal of such license or upon transfer to permit replacement of a vehicle for that licensed unless, after a public hearing held in the same manner as specified for hearings in Section 28-22.1, the commissioner shall report to the council that public convenience and necessity require additional terminal vehicle service and shall recommend the number of such vehicle licenses which may be issued:

"In determining whether public convenience and necessity require additional terminal vehicle service due

consideration shall be given to the following:

1. The public demand for such service;
2. The effect of an increase in the number of such vehicles on the safety of existing vehicular and pedestrian traffic in the area of their operation;
3. The effect of an increase in the number of such vehicles upon the ability of the licensee to continue rendering the required service at reasonable fares and charges to provide revenue sufficient to pay for all costs of such service, including fair and equitable wages and compensation for licensee's employees and a fair return on the investment in property devoted to such service;
4. Any other facts which the commissioner may deem relevant.

If the commissioner shall report that public convenience and necessity require additional terminal vehicle service, the council, by ordinance, may fix the maximum number of terminal vehicle licenses to be issued not to exceed the number recommended by the commissioner."

The foregoing § 28-31.1 was held invalid by the Court of Appeals (R. 208).

COMMENCEMENT OF THE LITIGATION

The railroads and Transfer advised the City that Chapter 28 as amended July 26, 1955, did not apply to their transfer operation arranged by the contract between them (R. 25-43), but that if it did apply it was invalid because of conflict with the Commerce Clause; but nevertheless, the City asserted that the ordinance as amended did apply to such transfer service, and was valid, and that the City would enforce it against the railroads and Transfer (R. 6-7 § 4). Thereafter the railroads and Transfer sued in District Court for declaratory judgment that the ordinance

is inapplicable, but that if applicable, it violates the Commerce Clause, and asked for injunction against its enforcement (R. 4-54). Parmelee was permitted to intervene as a defendant under Rule 24(b) over objection of the railroads and Transfer (R. 58-61, 65-68). The City moved for summary judgment (R. 71-72).

The District Court held Chapter 28 applicable to respondents and valid (R. 99-112, 155-159), and entered final judgment (R. 160):

"* * * that summary judgment be entered in favor of the defendants against the plaintiffs, with costs, and that this action be and it is hereby dismissed."

The railroads and Transfer appealed from this judgment to the Court of Appeals (R. 161-162).

In the Court of Appeals the City and Parmelee strongly asserted and argued in their joint brief (1) that Chapter 28 is applicable to the interstation transfer service, and (2) that Chapter 28 is valid in all respects. (Certified copy of this brief is filed here.)

The Court of Appeals held Chapter 28 applicable to the transfer service (R. 208-209, 200) but held § 28-31.1 (R. 44-45) to be invalid because in conflict with the Interstate Commerce Act and the Commerce Clause (R. 208, 204-211).

SUMMARY OF ARGUMENT

1.

A basic error runs through petitioner's entire brief. Petitioner is trying to pretend that there remains open for decision the question whether Chapter 28 of the Chicago Municipal Code applies to respondents. In both Courts below petitioner strongly contended that Chapter 28 is applicable to respondents, and both Courts below decided that issue in petitioner's favor. Petitioner cannot now take the position that the Courts below erred in deciding this issue in accordance with petitioner's earnest contentions; and petitioner cannot now assert that this question is open for decision.

The Supreme Court of Illinois holds that the City of Chicago and other municipal corporations are bound on appeal by the positions taken in the courts below, *City of Chicago v. University of Chicago*, 228 Ill. 605, 607; and that holding accords with the general principle adhered to by this Court that a litigant cannot change his position in the appellate court.

2.

Although petitioner sought and obtained judgments in both Courts below that Chapter 28 is applicable to respondents, petitioner is now asserting for the first time that the issue of whether Chapter 28 is applicable to respondents should be remitted to Illinois courts for decision. Petitioner makes no attempt to show that there is any ambiguity in the ordinance that requires construction, and there is none whatsoever. The ordinance is brief and clear on this point. Moreover, petitioner does not even say what construction it would urge if the issue were remitted to the Illinois Courts.

This Court holds that there is no occasion for remission

to state courts for construction of state statutes where, as here, the statute is clear. *Toomer v. Witsell*, 334 U.S. 385, 392 footnote 15 (1948). Moreover, so far as we can find, in every case which this Court has remitted to state courts for construction of statutes, the state authorities from the inception of the litigation had demanded remission to state courts. There is assuredly no cause whatsoever for remission to the Illinois courts here.

3.

Petitioner argues that the Court of Appeals improperly resorted to the legislative history of the ordinance in determining that it applies to respondents. But petitioner is in error in that contention in two respects. (1) Since petitioner urged the Court to hold that Chapter 28 applies to respondents, petitioner is not in position to assert that the Court erred in deciding that issue for petitioner or in looking to the legislative history for that purpose. (2) Moreover, the Court did not resort to legislative history to decide the question of applicability at all. The Court looked to the legislative history on an entirely different issue. Petitioner argued in the Court of Appeals that the plain words of § 28-31.1 should be given a construction different from their common meaning, and the Court consulted the legislative history to see whether there was any substance to petitioner's argument. The Court held there was not.

The materials of legislative history which the Court consulted are petitioner's own official records, and petitioner has never contended that they are not correct. The Court properly consulted them. Decisions of the Supreme Court of Illinois and of this Court are clear and explicit that these records may be looked to in order to ascertain legislative intent.

4.

The interstation transfer service is a railroad operation subject to Part I of the Interstate Commerce Act and is being performed by the railroads; the identity of Transfer is merged in the railroads for purpose of regulation as railroad transportation subject to Part I. 49 U.S.C. § 302(c)(2). The service is performed pursuant to tariffs filed with the Interstate Commerce Commission, and the Commission regulates the service and can compel the railroads to perform it. Other Federal statutes authorize and compel performance of the service: 49 U.S.C. § 3(4); 45 U.S.C. § 84. The last named was enacted in 1866 to make the principle of *Gibbons v. Ogden*, 9 Wheaton 1 (1824), applicable to interstate railroad transportation, and the instant case affords a perfect example for the application of *Gibbons v. Ogden*.

Section 28-31.1, the only provision of Chapter 28 held invalid by the Court of Appeals, would give to the City the power to deny the railroads the right to operate the transfer service upon the ground that public convenience and necessity does not require interstate commerce. The Court of Appeals rightly held that that section was in conflict with Federal statutes and was invalid under the Commerce Clause.

ARGUMENT

I.

THE QUESTION OF THE APPLICABILITY OF THE ORDINANCE IS NOT BEFORE THE COURT

In both Courts below petitioner obtained judgments requested by petitioner that Chapter 28 of the Chicago Municipal Code is applicable to respondents' interstation transfer operation. Petitioner cannot now take the position that the Courts below erred in agreeing with petitioner or that the question is open for decision.

A basic error runs through petitioner's entire brief. Petitioner is trying to pretend that there remains open for decision the question whether Chapter 28 of the Chicago Municipal Code applies to respondents. But that question is not before the Court. Having urged successfully in both Courts below that Chapter 28 applies to respondents petitioner cannot now claim that this question is open or that the Courts below erred in agreeing with petitioner.

In the District Court it was conclusively established as undisputed fact that *petitioner claims* that Chapter 28 is applicable to respondents' interstate interstation transfer service, that Chapter 28 is valid in all respects, and that petitioner intends to enforce all provisions of Chapter 28 against respondents and against respondents' interstate interstation transfer service (R. 6 § 4, 71-72).

The District Court held Chapter 28 including § 28-31.1 (R. 171-189, 44-45) applicable to respondents and valid in all respects, and dismissed respondents' complaint (R. 158-160). Respondents alone appealed from this judgment to the Court of Appeals.

In the Court of Appeals petitioner strongly urged the Court to affirm the two holdings of the District Court (1)

that Chapter 28 is applicable to respondents, and (2) that Chapter 28 is valid in all respects. (Certified copy of petitioner's brief in the Court of Appeals is filed here.) The Court of Appeals held Chapter 28 applicable to respondents (R. 208-209, 200) in accord with petitioner's earnest arguments on that behalf, but held § 28-31.1 of Chapter 28 invalid because in conflict with federal authority (R. 208, 204-211).

In its brief before the Court of Appeals petitioner said on the issue of applicability, pp. 12-13:

"That the framers of the ordinance in question intended to regulate the business carried on by Transfer wholly within the City of Chicago is hardly subject to challenge. Appellants have themselves made pointed reference to the legislative history (R. 92), and the language of the ordinance leaves no room for doubt. For among the list of motor vehicles carrying passengers for hire which are made subject to the terms of the ordinance are 'terminal vehicles.' A 'terminal vehicle' is defined in the ordinance as 'a public passenger vehicle which is operated exclusively for the transportation of passengers from railroad terminal stations and steamship docks to points within the area bounded on the north by Ohio Street, on the west by Desplaines Street, on the south by Roosevelt Road, and on the east by Lake Michigan. Chicago Municipal Code, c. 28, §§ 28-4, 28-31. All of the railroad terminal stations are within this area. *A more accurate description of the business engaged in by Transfer would be hard to find.*" (Emphasis added).

The definition of "terminal vehicle" quoted by petitioner in the foregoing excerpt from its brief is the definition in Chapter 28 as amended in 1955 (R. 44).

Since petitioner strongly took the position in both Courts below that Chapter 28 applies to respondents, and since both

Courts below decided this issue in petitioner's favor, petitioner cannot now take a contrary position or take the position that the question is open for decision. *City of Chicago v. University of Chicago*, 228 Ill. 605, 607, 81 N.E. 1138 (1907); *Drainage Comrs. Dist. No. 2 v. Drainage Comrs. Dist. No. 3*, 211 Ill. 328, 331, 71 N.E. 1007, 1009 (1904); *Heh v. City of Chicago*, 328 Ill. App. 488, 491, 66 N.E. 2d 491, 492 (1946); *New York Elevated Railroad Co. v. Fifth National Bank*, 135 U.S. 432, 441 (1890); *Callanan Road Improvement Co. v. United States*, 345 U.S. 507, 513 (1953). In *City of Chicago v. University of Chicago*, *supra*, the Supreme Court of Illinois said:

"It is first contended by appellants that the ordinances providing for the remission of water rates to charitable, religious or educational institutions are invalid because the city cannot give away any public property. The question does not arise on this record. The answer expressly avers that the system of water-works is the private property of the city, conducted as a private enterprise and not as a governmental function, and that the city has full right and authority to charge and collect from its patrons whatever rates it may see fit to fix, so long as they are reasonable; and to designate institutions to which it will furnish water free. Having alleged the validity of the ordinance in its pleading and proceeded to a hearing on that theory, the city cannot now be heard to say that the circuit court erred in adopting its view."

It is not necessary to change the word "validity" in the last sentence above to "applicability" in order to say that that case fits the instant case perfectly.

2.

NO OCCASION EXISTS FOR REMISSION OF ISSUES TO ILLINOIS COURTS

Petitioner makes no attempt to point to any ambiguity in Chapter 28 and none exists. The ordinance is clear and petitioner fails to point to any error in its construction by the Courts below. No occasion exists for remission of issues to the Illinois Courts.

After having obtained judgments which it requested in the Courts below holding that Chapter 28 is applicable to respondents' interstation transfer service, petitioner is now making the contention for the first time, p. 17, that the cause should be remitted to Illinois Courts for the construction of the ordinance on the question of applicability. There is no merit in this claim.

Petitioner does not even attempt to show any ambiguity that calls for construction. Petitioner fails to state what construction it would urge if the cause were remitted to the Illinois Courts. Petitioner fails to show any basis whatsoever for its request.

The principle governing this case is set forth very clearly in *Toomer v. Witsell*, 334 U.S. 385 (1948), which affirmed *Toomer v. Witsell*, D.C.S.C., 73 F. Supp. 371 (1947). The District Court there said, p. 374:

"The statutes involved are clear and there is no such need for interpretation or other special circumstances as would warrant the Court in staying action pending proceedings in courts of the state, as was held proper in *American Federation of Labor v. Watson*, 327 U.S. 582, 595, 599."

On that point this Court said, 334 U.S. p. 392 footnote 15:

"Appellees stress *American Federation of Labor, Metal Trades Dept. v. Watson*, 327 U.S. 592, (1946).

We think the doctrine of that case applicable to one of the arguments made against § 3374, *supra* note 10. See the third division of this opinion; *infra*, p. 394. As to all the other statutes, except that relating to state income taxes, however, we agree with the District Court that there is neither need for interpretation of the statutes nor any other special circumstance requiring the federal court to stay action pending proceedings in the State courts."

Similar holdings are *Morey v. Doud*, 354 U.S. 457, 469-470 (1957), and *Alabama Public Service Commission v. Southern Railway Co.*, 341 U.S. 341, 344 (1951).

Thus remission to state courts is a matter for the Court's discretion, and only where the Federal Court is itself unable to construe the statute. Here petitioner does not attempt to point to ambiguity that requires clarification, since there is none. Petitioner only claims remission as a matter of right, and no such right exists.

The provision of Chapter 28 which petitioner would have the Court remit to the Illinois Courts for construction is § 28-1 as amended in 1955 (R. 44):

"Terminal vehicle means a public passenger vehicle which is operated exclusively for the transportation of passengers from railroad terminal stations and steamship docks to points within the area defined in Section 28-31."

The "area defined in Section 28-31" (R. 44) is just enough to include all of the downtown Chicago railroad stations.

Section 28-1 is the same section as to which petitioner said in its brief in the Court of Appeals, p. 13:

"A more accurate description of the business engaged in by Transfer would be hard to find."

The Court of Appeals agreed with Petitioner (R. 208).

209, 200) that Chapter 28 is applicable to the transfer service. Now petitioner is reneging on the solemn assurance it gave to the Court of Appeals.

Petitioner relies upon *Government & C.F.O.C., C.J.O. v. Windsor*, 353 U.S. 364 (1957), but there are at least two differences which make that case inapplicable here. In that case the state officials made the objection at the outset that the cause should be remitted to the state courts for construction of the statute. 116 F. Supp. 354, 357. And the various opinions in the case show a genuine and substantial question of construction, which is not present here.

We have examined all of the opinions of this Court remitting decision to state courts, and in every one the demand for remission was made at the outset of the litigation. Where, as here, the statute is simple, the petitioner has obtained in the two Courts below the construction it there demanded, and the plea for remission is first made in this Court, no case exists for remission.

THE DECISION OF THE FEDERAL COURTS THAT CHAPTER 28
IS APPLICABLE WOULD BE RES JUDICATA
IN THE ILLINOIS COURTS.

If the Court were to remit the cause to the Illinois Courts for consideration of the issue of applicability of Chapter 28, there could be no decision there since the judgments of the two Federal Courts would be *res judicata* on the question there. *State Life Insurance Co. v. Board of Education*, 394 Ill. 301, 317, 324, 68 N.E. 2d 525, 533, 536 (1946); *Stoll v. Gottlieb*, 305 U.S. 165 (1938). In the first case the Supreme Court of Illinois held that a construction of an Illinois statute by a Federal court was *res judicata* when an attempt was made to relitigate the question of construction in a case between the same parties in an Illinois court. It

held that this was true even though, as it appeared there, the Federal court had adopted a construction not in accordance with Illinois law. In *Stoll v. Gottlieb*, *supra*, the Court reversed an Illinois decision for failing to hold that the judgment of a Federal court was *res judicata* in an Illinois court.

3.

RESORT TO LEGISLATIVE HISTORY WAS PROPER

Section 28-31.1 is invalid on its face, and the Court of Appeals so held without resort to legislative history. But petitioner argued that the words of § 28-31.1 should be given a meaning different from that accorded them by the Supreme Court of Illinois and by this Court. To consider that argument the Court looked to the report of the City Council Committee recommending § 28-31.1 for passage. It should be noted that the Court did not resort to legislative history to determine whether the ordinance is applicable to respondents, and petitioner is in error in so alleging.

Petitioner argues, pp. 8-9, that the Court of Appeals improperly resorted to the legislative history of the ordinance in determining that the ordinance applies to respondents' interstation transfer services. There are two immediate answers to that. (1) The Court did not look to the legislative history for that purpose at all, but for another purpose which was induced by one of petitioner's arguments on another subject. (2) As shown in our part 1 above, petitioner steadfastly contended in both courts below that the ordinance applies to respondents; hence petitioner cannot now complain that the Court considered the legislative history in reaching agreement with petitioner on the issue of applicability.

The Court looked to the legislative history in connection with an issue entirely different from the question of ap-

plicability petitioner is now trying to assert, and this resort to legislative history was occasioned by an argument in petitioner's brief in the Court of Appeals. The Court held § 28-31 invalid on its face without resort to legislative history; that is entirely clear (R. 205-208). But then in response to an argument by petitioner that the plain words of that section have a meaning entirely different from their commonly accepted meaning, the Court considered the legislative history and concluded that there was nothing in it that supported petitioner's argument (R. 208).

Thus in its brief before the Court of Appeals petitioner said in part, p. 36:

"The constitutional issue as to whether the ordinance imposes an undue burden on interstate commerce is not nearly so intricate and confused as would appear from appellants' briefs. The issue may be clarified and simplified if two basic propositions are borne in mind:

"1. We concede that the city may not withhold a license to carry on interstate transfer operations solely or even primarily on the ground that existing facilities are adequate, or that additional operations will adversely affect the competitive situation, or other such 'economic' grounds. *Buck v. Kaykendall*, 267 U.S. 307 (1925)."

And petitioner further said, pp. 52-53:

"1. The term 'public convenience and necessity' aptly refers to considerations within the police power.

"The term 'public convenience and necessity' may well have acquired some economic connotations because of the manner in which the concept is normally employed, i.e., by agencies having full power to consider the economic desirability of issuing a license or certificate as well as factors bearing on public health, safety, and welfare. It is by no means, however, con-

fined to economic considerations, but is sufficiently broad to encompass considerations of public health, safety, and welfare; and it is an appropriate term to be used where the agency in question has power to consider only such police factors as distinguished from economic considerations."

* * * * *

"The Supreme Court has never doubted that a 'certificate of public convenience and necessity' may lawfully be withheld on police-power grounds."

While it is obvious that the grounds of selective denial of the right to engage in the transfer service would be irrelevant, as the Court of Appeals pointed out, citing *Castle v. Hayes Freight Lines*, 348 U.S. 61 (R. 209), the Court, nevertheless, also answered the argument on construction by referring to legislative history. After summarizing petitioner's "police power" arguments (R. 206-208), the Court rightly concluded (R. 208) that § 28-31.1 consisted only of economic regulation, but said (R. 208): "If there were any doubt that this conclusion is correct, the legislative history of the ordinance dispels that doubt." Then the Court summarized briefly the more extended statement of the legislative history in the Court's statement of the facts (R. 197-202).

It is clear that the Court's conclusion that § 28-31.1 is invalid, was not induced in any respect by its consideration of the legislative history, but that the Court's reference to that history was made for the purpose of ascertaining whether it supported petitioner's argument on construction. The Court found no support for that argument.

It is also clear that the materials of legislative history consulted by the Court (R. 93-95) were proper for that purpose. The two cases cited by petitioner, pp. 10-11, in support of its argument are not in point. Illinois decisions agree

with the decisions of this Court on resort to legislative history. Petitioner's two cases did not involve the materials of legislative history that are commonly accepted; there were no committee minutes or reports in petitioner's cases, only pro and con conversations and correspondence.

In the instant case there are the official minutes of the Committee on local transportation of July 21, 1955 (R. 93-94), and the official minutes and report of the Committee to the Council of July 26, 1955 (R. 95-96, 44), followed by the specific action of the Council enacting the ordinance described in and transmitted to the Council with the report (R. 44-45). This was proper material for consideration of legislative history. *United States v. International Union, U. A. W.*, 352 U.S. 567, 570 (1957); *Western Sand & Gravel Corp., v. Town of Cornwall*, 2 Ill. 2d 560, 564, 119 N.E. 2d 261, 264 (1954).

The principle of resort to legislative history is too well understood to require argument. *United States v. International Union, supra*. It is established in the law of Illinois. In *City of Rockford v. Schultz*, 296 Ill. 254, 257, 129 N.E. 865, 866 (1921) the Court said, in words closely applicable to the instant case:

"The object in construing a statute is to ascertain and give effect to the legislative intent, and to that end the whole act, the law existing prior to its passage, any changes in the law made by the act, and the *apparent motive for making such changes*, will be weighed and considered." (Emphasis added.)

There the Supreme Court of Illinois resorted to the report of a special committee of the legislature to ascertain "the apparent motive" in amending a statute.

In *Dean Milk Co. v. Chicago*, 385 Ill. 565, 570, 53 N.E. 2d 612, 615 (1944), the Court said:

"The rules for the construction of an ordinance are the same as those applied in the construction of a statute."

The Court there considered a large amount of extrinsic legislative history and testimony of expert witnesses to determine the meaning of the ordinance, citing the foregoing as justification for such procedure.

In *People v. Olympic Hotel Bldg. Corp.*, 405 Ill. 440, 445, 91 N.E. 2d 597, 600 (1950), the Court said:

"Resort to explanatory legislative history has been declared not to be forbidden no matter how clear the words may first appear on superficial examination. (*Harrison v. Northern Trust Co.*, 317 U.S. 476.)"

In the case cited in the foregoing excerpt this Court made the statement attributed to it in consulting the report of a committee.

In *Boshuizen v. Thompson & Taylor Co.*, 360 Ill. 160, 163, 195 N.E. 625, 626 (1935), the Court said:

"For the purpose of passing upon the construction, validity or constitutionality of a statute the court may resort to public official documents, public records, both State and national, and may take judicial notice of and consider the history of the legislation and the surrounding facts and circumstances in connection therewith."

It is entirely clear that the Court of Appeals reached the conclusion that § 28-31.1 is invalid on its face under the Commerce Clause without taking the legislative history into consideration (R. 205-208). The Court did not resort to legislative history as a basis for concluding that § 28-31.1 is invalid, but only to answer an argument of Parmelee and the City to the effect that the section should be given a meaning differing from its plain terms. Thus the legislative

history at the most hardly rises to the dignity of cumulative evidence on this issue, and clearly had no effect upon the Court's conclusions in reaching its decision that the section is invalid.

THE LEGISLATIVE HISTORY IS TOO PATENT IN THE
FRAMEWORK OF THIS CASE TO BE OVERLOOKED

Independently of the foregoing however, the legislative history of § 28-31.1 of Chapter 28 is just too patent and too pervading in the framework of this case to be overlooked. The progression of events reveals an impressively purposeful, and temporarily successful, course of action that cannot be ignored.

The most superficial glimpse of these events is fully revealing. For some years Chapter 28 of the Chicago Municipal Code had regulated *inter alia* "terminal vehicles" (R. 171-189). These were defined (R. 172) as a "public-passenger vehicle which is operated under contracts with railroad and steamship companies, exclusively for the transfer of passengers from terminal stations." Parmelee had the only contract. On June 13, 1955, the railroads announced that they were discontinuing their relations with Parmelee and had arranged with Transfer to perform the service beginning October 1, 1955 (R. 82). On July 26, 1955, the Council passed the 1955 amendment to Chapter 28 (R. 44-45).

Now § 28-31.1 gave to the City Council the right to determine by ordinance whether anyone other than Parmelee may engage in interstate commerce by terminal vehicle. And the sole criterion for Council action is the economic concept of "public convenience and necessity."

These public events, occurring between June 13 and July 26, 1955, could mean only that the City and Parmelee

were trying to perpetuate Parmelee as the transfer agent of the railroads and to prevent Transfer from performing the service. And the City and Parmelee never made any secret of the fact that such was their purpose. They stoutly defended § 28-31.1 in the District Court and filed a joint brief in the Court of Appeals, insisting that § 28-31.1 was applicable to respondents' transfer service and was valid and that they intended to enforce § 28-31.1 against the railroads and Transfer. They are making the same contentions here.

These public events clearly reveal the City's and Parmelee's purpose without resort to the proceedings of the Council Committee on Local Transportation. But any interested person looking at the Council proceedings (R. 44) could not fail to notice reference to the Committee's report. From there it is most natural to go to the official records of the Committee's proceedings (R. 93, 96). Assuredly one is not compelled to be so blind or naive as not to notice these interesting official records which so clearly corroborate the plain meaning of the public events leading to the enactment of § 28-31.1.

PETITIONER'S ARGUMENT THAT "PUBLIC CONVENIENCE AND NECESSITY" EMBRACES ORDINARY POLICE POWER FACTORS AND NOT TRANSPORTATION ECONOMICS CONSIDERATIONS IS ERRONEOUS

Petitioner's arguments in the Court of Appeals, above described, that the term "public convenience and necessity" embraces only valid police power factors and not considerations of transportation economics, and hints along the same line in its brief here, pp. 17-18, are wholly lacking in foundation and are erroneous.

The Supreme Court of Illinois and this Court have un-

formly held that the phrase "public convenience and necessity" includes only the economic regulation of transportation and not any elements of the police power. In *Egyptian Transportation System v. Louisville and Nashville R. Co.*, 321 Ill. 580, 587-588, 152 N.E. 510, 512-513 (1926), the Court said:

"To authorize an order of the Commerce Commission granting a certificate of convenience and necessity to one carrier though another is in the field it is necessary that it appear first that the existing utility is not rendering adequate service. (*West Suburban Transportation Co. v. Chicago and West Towns Railway Co.*, 309 Ill. 87.) The method of regulation of public utilities now in force in Illinois is based on the theory of a regulated monopoly rather than competition, and before one utility is permitted to take the business of another already in the field it is but a matter of fairness and justice that it be shown that the new utility is in a position to render better service to the public than the one already in the field. (*Chicago Motor Bus Co. v. Chicago Stage Co.*, 287 Ill. 320.) It is in accord with justice and sound business economy that the utility already in the field be given an opportunity to furnish the required service."

In *The Commerce Commission v. Chicago Railways Company*, 362 Ill. 559, 566, 1 N.E. 2d 65, 68-69 (1936), the Court said:

"Before the enactment of the Public Utilities Act such highways and streets were open to competition by any company which sought to carry passengers, provided it had the proper highway consent. The purpose of the Utilities act was to control this competition so that such service would not be destroyed because of ruinous competition but would be protected under proper regulation."

In *Schuller Piano Co. v. Illinois Northern Utilities Co.*,

288 Ill. 580, 585-586, 123 N.E. 631, 633 (1919), the Court said:

"The Public Utilities act of this State has no relation to the public health, safety or morals, but was enacted to protect the public against unreasonable charges and discrimination and to promote the general welfare."

In many other cases the Illinois Court has held without exception that the phrase "public convenience and necessity" in the Illinois Public Utilities Act, Ill. Rev. Stat., 1955, Bar Assn. Ed., Ch. 111½, § 56, set out in part in appendix hereto, relates only to economic regulation of competition, monopoly, rates, services, and other economic factors, and does not embrace any elements of police power regulation.¹

Section 28-31.1 was copied bodily from § 28-22.1 of Chapter 28 which regulates taxicabs (R. 183-184). This section was construed by the Supreme Court of Illinois in 1947 to be a measure for the economic regulation of the taxicab business, a means of limiting the number of cabs for the purpose of limiting competition, and was held valid. *Yellow Cab Co. v. City of Chicago*, 396 Ill. 388, 71 N.E. 2d 652. While Illinois has that power in respect to intrastate commerce by taxicab it has no such power in respect to interstate commerce.

In *Interstate Commerce Commission v. Parker*, 326 U.S. 60 (1945), the Court was called upon for construction and application of the phrase "public convenience and necessity"

¹ *Eagle Bus Lines, Inc. v. Illinois Commerce Commission*, 3 Ill. 2d 66, 119 N.E. 2d 915 (1954); *Chicago & West Towns Railways, Inc. v. Illinois Commerce Commission*, 383 Ill. 20, 43 N.E. 2d 320 (1943); *Bartonville Bus Line v. Eagle Motor Coach Line*, 326 Ill. 200, 157 N.E. 175 (1927); *Illinois Power & Light Corp. v. Commerce Commission*, 320 Ill. 427, 151 N.E. 326 (1926).

in the Interstate Commerce Act. The Court said *inter alia*, p. 69:

"Public convenience and necessity should be interpreted so as to secure for the Nation the broad aims of the Interstate Commerce Act of 1940." (citing cases).

The Act of 1940 created 49 U.S.C. § 302(c), 54 Stat. 920. Obviously the "broad aims" of that act cannot be realized if the City of Chicago is to be permitted to set its own standards of public convenience and necessity for interstate commerce which is performed pursuant to § 302(c).

However, the short and immediately dispositive answer is that the interstate transportation here involved could not be barred for any reason, particularly where the transportation is not considered objectionable and denials would be made only on a selective basis. *Castle v. Hayes Freight Lines*, 348 U.S. 61 (1954); *Gibbons v. Ogden*, 9 Wheaton 1 (1824); *Pensacola Telegraph Co. v. Western Union Telegraph Co.*, 96 U.S. 1 (1878).

4.

SECTION 28-31.1 IS INVALID UNDER THE COMMERCE CLAUSE

The interstation transfer service is being performed by the railroads as railroad transportation subject to Part I of the Interstate Commerce Act by force of 49 U.S.C. § 302(c)(2). It is performed pursuant to tariffs filed with the Interstate Commerce Commission and is regulated by the Commission. The Federal acts under which the service is performed conflict with § 28-31.1 of Chapter 28 and render it invalid.

Petitioner states in the heading of Part II of its brief, p. 12: "The city has power to license and regulate the use of city streets for the transportation of passengers for

hire, even though interstate commerce is affected thereby, without placing an unreasonable burden thereon." The Court of Appeals held all of Chapter 28 valid and applicable (R. 208-209, 200) except § 28-31.1, which it held invalid under the Commerce Clause and the Interstate Commerce Act (R. 208, 204-211). In support of the judgment of the Court of Appeals, and to meet petitioner's sweeping argument as captioned above, we repeat here the argument in our brief in No. 104, pp. 17-23, 25-35.

THE NATURE OF THE 1955 AMENDMENT

The text of the 1955 amendment to Chapter 28 (R. 44-45) and the circumstances of its origin have been set out above, pp. 5-8. It will be noted that new § 28-31.1 accomplishes two things. (1) It provides for the annual renewal or transfer to replacement vehicles of all of the existing Parmelee terminal vehicle licenses without proof of public convenience and necessity. (2) It compels any other applicant for a terminal vehicle license to prove to the satisfaction of the city vehicle license commissioner that "public convenience and necessity" requires issuance of the license, and it provides that upon a favorable report by the commissioner "the council, by ordinance, may fix the maximum number of terminal vehicle licenses to be issued not to exceed the number recommended by the Commissioner."

In sum and substance new § 28-31.1 gave to the City Council the right to determine by ordinance whether anyone other than Parmelee may engage in interstate commerce by terminal vehicle. The sole criterion for Council action is the economic concept of "public convenience and necessity."

There are no possible facets of validity in § 28-31.1. (1) This is not a case where regulatory legislation is aimed at a type of traffic deemed undesirable. Parmelee is per-

mitted to continue with all its vehicles. (2) Section 28-31.1 did not add any safety measures whatsoever to those already existing and applicable in Chapter 28 (R. 171-189). It cannot be justified as a "police power" measure. (3) The provision of numbered subparagraph 2 of § 28-31.1 was not actually intended to reduce traffic congestion. This is so because all of Parmelee's vehicles are left in operation and the ordinance as amended can only add more vehicles.

No decision of the Court ever has sustained a measure of this character. Instead, there are numerous cases holding such an enactment violative of the Commerce Clause. We will proceed to consider the nature of the transfer service, and we will show that under federal statutes and decisions § 28-31.1 is invalid in its application to the service.

THE TRANSFER SERVICE IS RAILROAD TRANSPORTATION
SUBJECT TO PART I OF THE INTERSTATE COMMERCE ACT

The interstation transfer service is railroad transportation subject to Part I of the Interstate Commerce Act, and is being performed *by the railroads* by force of § 202(c)(2) of Part II of the Act, 49 U.S.C. § 302(c)(2), and other federal statutes. Section 302(c) is the following:

§ 302(c) Notwithstanding any provision of this section or of section 303, the provisions of this part [Part II], except the provisions of section 304 relative to qualifications and maximum hours of service of employees and safety of operation and equipment, shall not apply—

(1) to transportation by motor vehicle by a carrier by railroad subject to part I, or by a water carrier subject to part III, or by a freight forwarder subject to part IV, incidental to transportation or service subject to such parts, in the performance within terminal areas of transfer, collection, or delivery services; but such transportation shall be considered to be and shall

be regulated as transportation subject to part I when performed by such carrier by railroad, as transportation subject to part III when performed by such water carrier, and as transportation or service subject to part IV when performed by such freight forwarder;

(2) to transportation by motor vehicle by any person (whether as agent or under a contractual arrangement) for a common carrier by railroad subject to part I, an express company subject to part I, a motor carrier subject to this part, a water carrier subject to part III, or a freight forwarder subject to part IV, in the performance within terminal areas of transfer, collection, or delivery service; but such transportation shall be considered to be performed by such carrier, express company, or freight forwarder as part of, and shall be regulated in the same manner as, the transportation by railroad, express, motor vehicle, or water, or the freight forwarder transportation or service, to which such services are incidental. (Act of Sept. 18, 1940, 54 Stat. 920; Act of May 16, 1942, 56 Stat. 300.)

If the railroads were performing the transfer service by their own directly owned and operated motor vehicles it would be hard to imagine that anyone would argue that the service was not railroad service under ¶ (1) of § 302(c). Yet the status of the service performed under the contract between the railroads and Transfer (R. 25-43) is, by force of ¶ (2) of § 302(c), precisely the same as if the railroads were performing it directly under ¶ (1). Thus it will be noted that § 302(c)(2) provides that

“ * * * transportation by motor vehicle by any person (whether as agent or under a contractual arrangement) for a common carrier by railroad subject to Part I * * * in the performance within terminal areas of transfer, collection, or delivery service. * * * shall be considered to be performed by such carrier * * * as part of, and shall be regulated in the same manner as, the trans-

portation by railroad * * * to which such services are incidental." (Emphasis added.)

While this language is entirely clear, it may be noted that Congress meant exactly what it said. See Conference Report; House Report No. 2832, 76th Cong., 3rd Sess., p. 74 § 17(B) (Serial vol. 10444):

"These definitions, as rewritten, also dealt with the case where a person (acting as agent or under a contractual arrangement) performed transfer, collection, or delivery services by motor vehicle within terminal areas for carriers by railroad, express companies, other motor carriers, or water carriers, and provided that in such a case the transportation should be regulated as transportation performed by the person for whom the services were rendered in the same manner as the railroad, express, motor carrier, or water transportation to which the services were incidental."

The effect of § 302(c)(2) is to merge the identity of Transfer into the railroads. Transfer is simply the *alter ego* of the railroads; and the transfer operation is simply and wholly railroad transportation. *Thomson v. United States*, 321 U.S. 19, 24 (1944); *United States v. Rosenblum Truck Lines*, 315 U.S. 50, 56 (1942). These cases hold that for purpose of regulation generally under the Interstate Commerce Act the agent, though performing all of the physical service, is integrated into the principal to the extent of losing his own identity. Here the statute so provides in express terms and makes the operation subject to Part I.

Decisions of the Interstate Commerce Commission illustrate the application of § 302(c). Before the section was effective, in *Pick-Up of Livestock in Illinois, Iowa and Wisconsin*, 238 I.C.C. 671 (1940), the Commission cancelled railroad tariffs providing for pick-up of livestock by motor

truck within a 10-mile radius of railroad stations on the grounds that the railroads had no motor carrier authority under Part II of the act and that the transportation was not subject to Part I, saying, 238 I.C.C. p. 678:

"It is our conclusion, therefore, that the motor-vehicle operations under consideration are not subject to the provisions of part I, and hence are subject to the provisions of part II. It necessarily follows that they are being conducted without lawful authority, since no certificate that public convenience and necessity require such operations has been sought or obtained."

After § 302(c) was enacted, Sept. 18, 1940, 54 Stat. 920, the Commission reopened the case and held that by force of the statute the proposed pick-up operations by the railroads were now lawful, *Pick-Up of Livestock in Illinois, Iowa and Wisconsin*, 248 I.C.C. 385 (1942), saying, p. 397:

"We find that respondents' schedules and that respondents' pick-up operations and practices thereunder to the extent hereinafter indicated are 'within terminal areas' within the meaning of section 202(c) of part II, and that such truck operations must be regulated as transportation subject to part I of the act. We further find that a lawful terminal area for each station should not exceed a radius of 10 miles, and that the tariffs should clearly and definitely define the areas within which pick-up service is performed."

In *Cartage, Rail to Steamship Lines at New York*, 269 I.C.C. 199, 200 (1947), the Commission held that § 302(c) empowered it to compel railroads to perform interstation transfer service by motor vehicle. In *Movement of Highway Trailers by Rail*, 293 I.C.C. 93, 97-103 (1954), the question was whether railroad owned highway trailers moved on railroad flat-cars in so-called "piggyback" service, and having prior and subsequent movements on their own wheels on city streets, were subject to Part I or Part II;

that is, whether the railroads needed authority under Part II in order to perform the operation ~~or~~ any part of it. The Commission held the entire operation subject to Part I, the movement on city streets being subject to Part I by force of § 302(c). Railroad tariffs defining the entire street-rail-street "piggyback" operation as subject only to Part I were held valid in *Trailers on Flatcars, Eastern Territory*, 296 I.C.C. 219 (1955), by reason of § 302(c). This section applies to passenger transfer. *New York, S. & W. R. Co. Application*, 46 M.C.C. 713, 722-725 (1946).

Section 3(4) of Title 49 provides:

"(4) All carriers subject to the provisions of this part shall, according to their respective powers, afford all reasonable, proper, and equal facilities for the interchange of traffic between their respective lines and connecting lines, and *for the receiving, forwarding, and delivering of passengers or property to and from connecting lines*; and shall not discriminate in their rates, fares, and charges between connecting lines, or unduly prejudice any connecting line in the distribution of traffic that is not specifically routed by the shipper. As used in this paragraph the term 'connecting line' means the connecting line of any carrier subject to the provisions of this part or any common carrier by water subject to part III." (Emphasis added.)

"There is no warrant for limiting the meaning of 'connecting lines' to those having direct physical connection

*** The term is commonly used as referring to all the lines making up a through route." *Atlantic Coast Line R. Co. v. United States*, 284 U.S. 288, 293 (1932). The lines operating the Chicago transfer service all make up through routes through Chicago (R. 7-8, 48-50, 74-79, 190-195), and thus the transfer service in Chicago is performed by connecting lines within the meaning of § 3(4).

By force of 49 U.S.C. § 3(4), *supra*, the railroads "are

required to * * * afford motor truck transfer in connection with transportation by rail." *Central Transfer Company v. Terminal Railroad Assn.*, 288 U.S. 469, 473 footnote 1 (1933).

The transfer service is performed pursuant to railroad tariffs filed with the Interstate Commerce Commission (R. 7-8, 74-79, 190-195). While tariffs remain on file they are presumed valid. *Robinson v. Baltimore & Ohio Railroad Co.*, 222 U.S. 506, 508-510 (1912). The tariffs have the force and effect of a statute in compelling performance of the service. *Pennsylvania Railroad Co. v. International Coal Mining Co.*, 230 U.S. 184, 197 (1913).

FEDERAL STATUTES HAVE SUPERSEDED THE POWER OF THE CITY TO ENFORCE § 28-31.1

Being railroad transportation subject to Part I the transfer service is subject to regulation thereunder and to other Federal Statutes respecting railroad transportation. By force of these statutes the power of the City to impose the regulation here in issue has been superseded and is void under the Commerce Clause.

THE INTERSTATE COMMERCE ACT

The Interstate Commerce Act was amended in 1906 to include express companies within its coverage for the first time, 34 Stat. 584, 49 U.S.C. § 1(3)(a). This inclusion was held to supersede the power of the City of New York to enforce an ordinance requiring licenses for express company trucks that delivered packages following an interstate railroad haul. *Barrett (Adams Express Co.) v. New York*, 232 U.S. 14 (1914). The Court said, p. 32:

"* * * Congress has exercised its authority and has provided its own scheme of regulation in order to secure the discharge of the public obligations that the

business involves. Act of June 29, 1906, c. 3594, 34 Stat. 584."

Answering the argument that the ordinance was valid under the police power the Court said, p. 31:

"Local police regulations cannot go so far as to deny the right to engage in interstate commerce, or to treat it as a local privilege, and prohibit its exercise in the absence of a local license."

To the same effect are *New York Central & Hudson River Railroad Co. v. Hudson County*, 227 U.S. 248, 263 (1913), and *Castle v. Hayes Freight Lines, Inc.*, 348 U.S. 61, 65 (1954). It is clear that 49 P.S.C. § 302(c)(2) supersedes the City's attempted regulation under § 28-31.1 of Chapter 28 (R. 44-45) as fully as the supersession considered in the three cases above cited. We will take up the *Hayes* case more fully later.

THE RAILROAD COMMUNICATION AND INTERCHANGE ACT OF 1866

A statute of significance to this case is 45 U.S.C. § 84. It was enacted in 1866 to put an end to an obstruction to interstate commerce by railroad remarkably similar to that here involved, and to outlaw all future obstructions of whatever nature to interstate commerce by railroad. Legislative history is explicit on these points, and the Court has given the statute the meaning and force called for by its history.

The exact form of enactment of the statute is of interest because of its history, 14 Stat. 66:

"CHAP. CXXIV.—*An Act to facilitate commercial, postal, and military communication among the several States.*

"Whereas the Constitution of United States confers upon Congress, in express terms, the power to regulate

commerce among the several States, to establish post roads, and to raise and support armies: Therefore:—

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That every railroad company in the United States, whose road is operated by steam, its successors and assigns, be, and is hereby, authorized to carry upon and over its road, boats, bridges, and ferries, all passengers, troops, government supplies, mails, freight, and property on their way from any State to another State, and to receive compensation therefor, and to connect with roads of other States so as to form continuous lines for the transportation of the same to the place of destination: *Provided,* That this act shall not affect any stipulation between the government of the United States and any railroad company for transportation or fares without compensation, nor impair or change the conditions imposed by the terms of any act granting lands to any such company to aid in the construction of its road, nor shall it be construed to authorize any railroad company to build any new road or connection with any other road without authority from the State in which said railroad or connection may be proposed.

Sec. 2. And be it further enacted, That Congress may at any time alter, amend, or repeal this act.

“APPROVED, June 15, 1866.”

Both the specific immediate purpose and the general purpose of this Act were stated in some detail in the House Committee Report recommending its passage, House Report No. 31, 38th Cong., 1st Sess., March 9, 1864 (Serial vol. 1206), printed in full in Appendix hereto p. 47. The bill proposed by the Report was passed by the House in the 38th Congress but was not voted upon by the Senate. This same bill was re-introduced as H.R. 11 in the 39th Congress, 1st Session, and was enacted.

The debates in both the 38th and 39th Congresses all revolve about the facts and issues recited in House Report No. 31. The linkage of 45 U.S.C. § 84 to House Report 31, 1st Sess., 38th Congress, is complete.²

The Report shows, *inter alia*: The New Jersey legislature chartered the Camden and Amboy Railroad Company and provided by an act of 1854:

"That it shall not be lawful, at any time during the said railroad charter, (to wit, the Camden and Amboy,) to construct any other railroads in this State without the consent of the said companies, which shall be intended or used for the transportation of passengers or merchandise between the cities of New York and Philadelphia, or to compete in business with the railroad authorized by the act to which this supplement is relative." (New Jersey Session Laws for 1854, p. 387.)"

Under that act the Camden and Amboy obtained an injunction in New Jersey courts forbidding a rival, the Delaware and Raritan Bay Railroad Company, "to carry or aid in carrying passengers and freight between New York and Philadelphia." The tracks of the Delaware and Raritan were in New Jersey but "by means of these roads and boats on Raritan Bay and the Delaware River, a continuous through line is constituted between the cities of New York and Philadelphia."

² The text of the bill in the 38th Congress, H.R. 307, is not contained in Report No. 31 which accompanied it, but is shown in the debates on passage in the House, 34 Cong. Globe 2253-2264; and the bill as passed appears at page 2264. In the 39th Congress the reintroduced bill was reported "do pass" as H.R. 11 by the Committee on Commerce, 36 Cong. Globe 82, and its proponents stated that it was the same bill as H.R. 307 which had failed to pass in the 38th Congress, 36 Cong. Globe 82-83. It was debated and passed in the House, 36 Cong. Globe 1548-1550, and in the Senate, 36 Cong. Globe 2870-2876.

The House Committee's conclusions were in part the following:

"In addition to the well-established power of Congress to establish post roads, the committee believe that its power to regulate commerce confers upon it ample authority to grant the petitioners' prayer, and to relieve them from the embarrassments created by the narrow and obnoxious legislation of New Jersey.

"Article 1, section 8, of the Constitution of the United States provides that Congress 'shall have power to regulate commerce with foreign nations, and among the several States, and with the Indian tribes.'

"This power has been held to be exclusive in Congress, and that it cannot be abridged or impaired by State legislation.—(*Gibbons v. Ogden*, 9 Wheaton.)"

"It clearly appears, from the various opinions given in these celebrated cases, that the power to regulate commerce is absolutely exclusive in Congress, so that no State can constitutionally enact laws or any regulation of commerce between the States, whether Congress has exercised the same power in question or left it free.

"The inference from the various cases cited is that New Jersey, by the law above quoted; and by virtue of which she is attempting to destroy the franchises of the petitioners, has usurped the jurisdiction of Congress, and that we are authorized to interfere to prevent that usurpation from abridging one of the means of communication between New York and Philadelphia."

The Act of June 15, 1866, 14 Stat. 66, 45 J.S.C. § 84, was the means adopted to accomplish the recommended action.

There is remarkable similarity between the New Jersey Act of 1854 and the Chicago ordinance of 1955, in respect both to ends and means. In each case a state legislative

body assumed the power to decide whom it would permit to engage in interstate commerce. The Court's decisions construing 45 U.S.C. § 84 are especially apposite to the instant case.

In *Bowman v. Chicago & North Western Railway Co.*, 125 U.S. 465 (1888), an Iowa statute was held invalid that forbade transportation of intoxicating liquor into the state except where a permit had been issued by the state.³ The Court, p. 484, *recited most of § 84*, referred to an act authorizing construction of railroad bridges, and said:

"These Acts were ~~passed~~^{enacted} under the power vested in Congress to regulate commerce among the several States, and were designed to remove trammels upon transportation between different States which had previously existed, and to prevent a creation of such trammels in future, and to facilitate railway transportation by authorizing the construction of bridges over the navigable waters of the Mississippi; and they were intended to reach trammels interposed by state enactments or by existing laws of Congress. * * * The power to regulate commerce among the several States was vested in Congress in order to secure equality and freedom in commercial intercourse against discriminating state legislation."

Union Pacific Railway Co. v. Chicago, Rock Island & Pacific Railway Co., 163 U.S. 564 (1896), involved an attempt by Union Pacific to cancel a contract with Rock Island providing for connections and through transportation between the two as *ultra vires* the U.P. Charter. The

³This decision prevailed until in 1913 the Webb-Kenyon Act, 37 Stat. 699, removed the protection of the Commerce Clause from intoxicating liquor. See *Clark Distilling Co. v. Western Maryland Railroad Co.*, 242 U.S. 311 (1917). See a brief comparison of the *Bowman* and *Clark Distilling* cases in *Prudential Ins. Co. v. Benjamin*, 328 U.S. 408, 424 fn. 29 (1946).

Court denied the relief sought. After reciting most of 45 U.S.C. § 84 the Court said, p. 589:

"It is impossible for us to ignore the great public policy in favor of continuous lines thus declared by Congress, and that such it is in effectuation of that policy that such business arrangements as will make such connections effective are made."

It may be noted that the *proviso* of 45 U.S.C. § 84 is in no way applicable here. What the railroads are here seeking to accomplish is not a new operation; they are simply continuing an interstation transfer service that they have been performing for many years, for the past seventeen years under 49 U.S.C. § 302(c)(2). It is the City that is trying to bring about a new situation, by the enactment of § 28-31.1.

THE TELEGRAPH ACT OF 1866

The same Congress that enacted the railroad communication act of 1866, now 45 U.S.C. § 84, also passed the telegraph act, July 24, 1866, 14 Stat. 221, now 47 U.S.C. §§ 1-5, Appendix p. 57. The two statutes have had parallel constructions and both have been cited in the same decisions on the issues of the instant case. Probably the most famous case to emerge from judicial construction of either act is *Pensacola Telegraph Company v. Western Union Telegraph Company*, 96 U.S. 1 (1878). A Florida statute, similar in effect to the Chicago ordinance, forbade any telegraph company to operate lines in interstate commerce except by the state's permission. The Court held that the federal act rendered the state act invalid under the Commerce Clause. This holding is indistinguishable from the issue of the instant case.

On the same day, March 19, 1888, that the Court decided *Bowman v. Chicago & North Western Railway Co.*, 125 U.S.

465, *supra*, it also decided *Western Union Telegraph Co. v. Atty. Gen. of Massachusetts*, 125 U.S. 530. There it was held that a Massachusetts statute was invalid by force of the telegraph act of 1866, in that it authorized an injunction forbidding operation of the telegraph lines until the company paid its taxes. The Court said, p. 554:

"If the Congress of the United States had authority to say that the Company might construct and operate its telegraph over these lines, as we have repeatedly held it had, the State can have no authority to say it shall not be done."

In *Kansas City Southern Railway Co. v. Kaw Valley Drainage District*, 233 U.S. 75 (1914), both the railroad and telegraph acts of 1866 were cited. The Court held invalid the judgment of a Kansas court ordering the railroad to remove certain bridges, saying pp. 78-79:

"The freedom from interference on the part of the states is not confined to a simple prohibition of laws impairing it, but extends to interference by any ultimate organ. It was held that under the permissive statute authorizing telegraph companies to maintain lines on the post roads of the United States a state could not stop the operation of the lines by an injunction for failure to pay taxes. *Western U. Teleg. Co. v. Atty. Gen.*, 125 U.S. 530; *Williams v. Talladega*, 226 U.S. 404, 415, 416. It would seem that the same principle applies to railroads under the commerce clause of the Constitution, especially if taken in connection with the somewhat similar statute now Rev. Stat. § 5258, U.S. Comp. Stat. 1901; p. 3565 [45 U.S.C. § 84]

"The decisions also show that a state cannot avoid the operation of this rule by simply invoking the convenient apologetics of the police power. It repeatedly has been said or implied that a direct interference with commerce among the states could not be justified in this way. * * *

GIBBONS V. OGDEN

The instant case affords a perfect example for the application of *Gibbons v. Ogden*, 9 Wheaton 1 (1824). There the New York legislature did not object to steamboats on the Hudson; instead it welcomed them, but only if they were operated under the license granted by the legislature to Fulton and Livingston and their successors. The Court held that the New York act was superseded by the federal coasting license act, 1 Stat. 305, 46 U.S.C. §§ 251 *et seq.*

Here the Chicago City Council does not object to the operation of the interstation transfer vehicles; instead it welcomes them, but only if they are operated under the licenses granted by the Council to Parmelee. Anyone else who wants to operate transfer vehicles in interstate commerce must go to the Council, via the license commissioner, and obtain the passage of an ordinance granting such authority (R. 44-45). Plainly, the ordinance is superseded by the Interstate Commerce Act and the railroad interchange act of 1866. It would be impossible for the railroads to assume their duties under those acts and at the same time yield to § 28-31.1 of the Chicago ordinance.

Moreover, one purpose of the railroad communication act of 1866 was to make the principle of *Gibbons v. Ogden* applicable to railroads. See pp. 37-39 above.

In *Harmon v. Chicago*, 147 U.S. 396 (1893), the Court held a Chicago ordinance invalid under the rule of *Gibbons v. Ogden*, *supra*, 9 Wheaton 1. The ordinance, "exact[ed] a license * * * For the privilege of navigating the Chicago river and its branches by tug boats." The tugs had federal coasting licenses. Citing *Gibbons v. Ogden*, the Court said, pp. 406-407:

* * * The requirement that every steam tug, barge, or towboat, towing vessels or craft for hire in the Chi-

cago river or its branches shall have a license from the City of Chicago, is equivalent to declaring that such vessels shall not enjoy the privileges conferred by the United States, except upon the conditions imposed by the city. This ordinance is, therefore, plainly and palpably in conflict with the exclusive power of Congress to regulate commerce, interstate and foreign. * * *

CASTLE V. HAYES FREIGHT LINES

Castle v. Hayes Freight Lines, 348 U.S. 61 (1954), has roots running directly to the railroad and telegraph acts of 1866 and to the decisions construing them. The *Hayes* case held invalid an Illinois statute authorizing state officials to forbid a motor carrier to operate on the state's highways for a fixed period as a penalty for habitual violation of state laws regulating the maximum weight of trucks. The Court said, pp. 63-64, that since Congress had vested the Interstate Commerce Commission with power to suspend or revoke motor carrier certificates

"* * * it would be odd if a state could take action amounting to a suspension or revocation of an interstate carrier's commission-granted right to operate. Cf. *Hill v. Florida*, 325 U.S. 538."

Hill v. Florida, 325 U.S. 538 (1945), cited in the foregoing excerpt, held invalid a Florida statute which forbade anyone to act as representative of a labor organization unless licensed as such by the state. The Court held that this requirement was invalid because in conflict with the provision of the National Labor Relations Act giving employees freedom to choose their own representative, saying p. 543:

"It is the sanction here imposed * * * which brings about a situation inconsistent with the federally protected process of collective bargaining. Cf. *Western Union Telegraph Co. v. Atty. Gen.*, 125 U.S. 530, 553.

554; *Kansas City Southern R. Co. v. Kaw Valley Drainage Dist.*, 233 U.S. 75, 78; *St. Louis Southwestern R. Co. v. Arkansas*, 235 U.S. 350, 368."

The federal statutes that authorize and compel the railroads to perform the interstation transfer service have supersedure power at least equal in force to the federal acts given effect in *Gibbons v. Ogden*, 9 Wheaton 1; *Pensacola Telegraph Co. v. Western Union Telegraph Co.*, 96 U.S. 1; and *Castle v. Hayes Freight Lines*, 348 U.S. 61. Any interruption of the transfer service would collide with the duty of the railroads to perform it under their tariffs, and with the power of the Interstate Commerce Commission to compel it.

WHO SHALL CONDUCT INTERSTATE COMMERCE

It is to be noted that the exercise of state power which the Court has forbidden in these leading cases is the power to say *who* shall engage in federally authorized interstate commerce. In these cases the states did not object to or attempt to stop steamboat traffic, telegraph lines, truck lines, or union business agents; they only wanted to say *who* should conduct these activities. But the Court held that the exercise of state power to decide *who* should conduct the operation was just as much of an obstruction to the commerce as an outright stoppage of it would be. Exactly the same principle is applicable here.

CONCLUSION

Petitioner's argument is confusing to us in some respects. But one thing is altogether clear. Petitioner wants to have this cause removed to a local Chicago court. There is no merit whatsoever in this plea, as we have pointed out in Parts 1 and 2 of our argument. But in addition to what we said there, we submit that this case involves the funda-

mental issue which called the Commerce Clause into being, the protection of interstate commerce against local political obstruction.

The only real issue here involves construction of the Commerce Clause and Federal statutes regulating interstate commerce. That issue is one for which the Federal courts were created and for which they are especially suited. See, for example, 28 U.S.C. § 1337. Petitioner points to no real issue of Illinois law now, and was entirely satisfied to have Federal cognizance of *all* issues in the two Courts below.

The judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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APPENDIX

38TH CONGRESS,
1st Session.

HOUSE OF REPRESENTATIVES

REPORT
No. 31.

DELAWARE AND RARITAN BAY RAILROAD
COMPANY.

[To accompany bill H. R. No. 307.]

MARCH 9, 1864.—Ordered to be printed.

MR. DEMING, from the Committee on Military Affairs,
made the following

REPORT.

*The Committee on Military Affairs, to whom was referred
the petition of the Raritan and Delaware Bay
Railroad Company, respectfully report:*

The petitioners pray that their roads and the boats connected with them may be declared post and military roads of the United States.

The committee find that the petitioners have completed a road of sixty-five miles in length, from Port Monmouth, near Sandy Hook, to Atsion, nearly east of the city of Philadelphia; and that they also have the control of the Camden and Atlantic Railroad Company; and that the two roads are connected by the Botsto branch of the Camden and Atlantic Railroad Company; and that by means of these roads and boats on Raritan bay and the Delaware river, a continuous through line is constituted between the cities of New York and Philadelphia.

The committee find that since the petition was brought before this committee the chancellor of New Jersey, at the suit of the Camden and Amboy Railroad Company, has enjoined the use of the petitioners' roads, except for local purposes, and has ordered that the Raritan and Delaware Bay Railroad Company pay to the Camden and Amboy Railroad Company all sums collected by the former for through business, including the amount received for transportation of troops; and that the chancellor decreed that the petitioners' road had no right to carry or aid in carrying passengers and freight between New York and Philadelphia.

The committee find that the act of the State of New Jersey, by authority of which the petitioners have been enjoined from carrying on their roads passengers and freights between New York and Philadelphia, is as follows: "That it shall not be lawful, at any time during the said railroad charter, (to wit, the Camden and Amboy,) to construct any other railroads in this State without the consent of the said companies, which shall be intended or used for the transportation of passengers or merchandise between the cities of New York and Philadelphia, or to compete in business with the railroad authorized by the act to which this supplement is relative."—(New Jersey Session Laws for 1854, p. 387.)

The committee find that from the 1st of September, 1862, to the 1st of June, 1863, there were transported from New York to Philadelphia, over the petitioners' road, 17,428 men, 649 horses; and 806,245 pounds of freight, under the orders of the government.

The committee find that Congress has five times exercised the power of establishing post roads. The first case in which it was exercised is to be found in volume 10 United States

Statutes at Large, page 112, where, in sections 6 and 8 of an act making appropriations for the Post Office Department, it is enacted that the bridges across the Ohio river at Wheeling, in the State of Virginia, and at Bridgeport, in the State of Ohio, abutting on Jane's island, in said river, are hereby declared to be lawful structures in their present position and elevation, and shall so be held and taken to be, anything in any law or laws of the United States to the contrary notwithstanding; and that said bridges are declared to be, and are, established *post roads* for the passage of the mails of the United States.

The second instance in which Congress exercised the power is to be found in "An act to establish certain post routes, and to discontinue others, (5 U. S. Statutes at Large, p. 271,) where, in section 2, it is provided that each and every railroad within the limits of the United States which now is, or hereafter may be, made and completed, shall be a post route, and the Postmaster General shall cause the mail to be transported thereon.

The third instance is in "An act to establish certain post roads," approved March 3, 1853, (U. S. Statutes at Large,) where the same legislation is reaffirmed; and it is again enacted in section 3 of said act, "that all railroads which now, or hereafter may be, in operation, be, and the same are hereby, declared to be post roads."

The fourth instance in which Congress exercised the right is found in volume 12, U. S. Statutes at Large, pp. 569, 570, where, in "An act to establish certain post roads," in sections 1 and 2, it is enacted "that the bridge partly constructed across the Ohio river, at Steubenville, in the State of Ohio, abutting on the Virginia shore of said river, is hereby declared to be a *lawful structure*."

"That the said bridge and Holliday's Cove railroad are hereby declared a public highway and established a *post road*, for the purpose of transmission of mails of the United States, and that the Steubenville and Indiana Railroad Company, chartered by the legislature of the State of Ohio, and the Holliday's Cove Railroad Company, chartered by the State of Virginia, or either of them, are authorized to *complete, maintain, and operate said road and bridge* when completed, as set forth in the preceding section, anything in the law or laws of the above-named States to the contrary notwithstanding."

The fifth congressional precedent is to be found in volume 12, U. S. Statutes at Large, p. 334. In "An act to authorize the President of the United States in certain cases to take possession of railroad and telegraph lines, and for other purposes," approved January 31, 1863, it is enacted that "the President of the United States, when in his judgment the public safety may require it, be, and he is hereby, authorized to take possession of any or all the railroad lines of the United States, so that they shall be considered *post roads, and part of the military establishment* of the United States."

Your committee find that the Supreme Court has affirmed the constitutionality of the act of Congress in reference to the Wheeling bridge. In 12th Howard, 528, the Supreme Court, after the passage of the act in question, denied a motion to punish the owners of the bridge for a contempt in rebuilding it, and affirm in the following words, "that the act declaring the Wheeling bridge a lawful structure was within the legitimate exercise by Congress of its constitutional power to regulate commerce."

In addition to the well-established power of Congress to establish post roads, the committee believe that its power

to regulate commerce confers upon it ample authority to grant the petitioners' prayer, and to relieve them from the embarrassments created by the narrow and obnoxious legislation of New Jersey.

Article 1, section 8, of the Constitution of the United States provides that Congress "shall have power to regulate commerce with foreign nations, *and among the several States*, and with the Indian tribes."

This power has been held to be exclusive in Congress, and that it cannot be abridged or impaired by State legislation.—(*Gibbons vs. Ogden*, 9 Wheaton.)

When the State of New York undertook to restrict navigation by local law, in granting to Livingston & Fulton an exclusive right to navigate the waters of New York with vessels propelled by steam, the Supreme Court of the United States, through Chief Justice Marshall, declared the restriction to be illegal, because it interfered with commerce between the States, and, in his opinion, he raised the intention of the Constitution above the narrow interpretation of the word "*commerce*," which would confine it to the transportation of property, and declared it embraced all inter-State communications, and the whole subject of intercourse between the people of the several States; thus ascribing to Congress the power to regulate the transit both of persons and property through and across contiguous or intervening States. In this case Chief Justice Marshall says:

"But in regulating commerce with foreign nations, the power of Congress does not stop at the jurisdictional lines of the several States. It would be a very useless power if it could not pass these lines. The commerce of the United States with foreign nations is that of the whole United

States. Every district has a right to participate in it. The deep streams which penetrate our country in every direction pass through the interior of almost every State in the Union, and furnish the means for exercising this right. Congress has the power to regulate it, that power must be exercised wherever the subject exists. If it exists within the States, if a foreign voyage may commence or terminate at port within a State, then the power of Congress may be exercised within a State."

In the case of the State of Pennsylvania vs. The Wheeling and Belmont Bridge Company, 18 Howard, 421, the State of Pennsylvania claimed the right to limit and control the means of transit across the Ohio river to the State of Ohio upon grounds of State interest, which were sustained by the Supreme Court so long as Congress refrained from legislation upon the same subject. By the law of Pennsylvania these bridges were condemned as nuisances, and the Supreme Court affirmed the condemnation. But the public demand for the increased commercial facilities afforded by these condemned structures claimed and received the attention of Congress, and, under its unquestioned power to regulate commerce and to establish post roads, it enacted in respect to each of these bridges that they were and should continue to be lawful structures, anything in any State law to the contrary notwithstanding. The Supreme Court sustained the action of Congress, as legalizing by its paramount authority the structures with the State sovereignty condemned, and they are now established as permanent post routes.

The argument by which the power of Congress to interpose in this and similar cases, when the general interests of commerce are embarrassed and impaired by local State legislation, is set forth with great clearness and force in

the opinion of the Supreme Court, delivered by Justice Nelson, in the case just cited. It concedes the right of State sovereignty within its own limits, and by its own legislative acts or compacts, to restrict or to encourage the enterprise of its own citizens, in the use of its own territory. But all such legislation is subject and subordinate to the constitutional power of Congress to regulate commerce among the States, and whenever that is exercised the local State laws and compacts must give way. If this were not so, the constitutional grant of the power would be a vain thing.

In the passenger cases, 18 Howard, 283, the Supreme Court holds that the statutes of New York and Massachusetts, imposing taxes upon alien passengers arriving at the ports of those States, was in derogation of the article of the Constitution which gives power to Congress to regulate commerce with foreign nations and among the States, and therefore unconstitutional and void.

In expressing the opinion of the Court, Judge McLean says, page 400: "Shall passengers, admitted by act of Congress without a tax, be taxed by a State? The supposition of such a power in a State is utterly inconsistent with a commercial power, either paramount or exclusive, in Congress."

Judge Grier says, page 462: "To what purpose commit to Congress the power of regulating our intercourse with foreign nations and among the States, if these regulations may be changed at the discretion of each State? And to what weight is that argument entitled which assumes that because it is the policy of Congress to leave this intercourse free, therefore it has not been regulated, and each State may put as many restrictions upon it as she pleases?"

It clearly appears, from the various opinions given in these celebrated cases, that the power to regulate commerce is absolutely exclusive in Congress, so that no State can

constitutionally enact laws or any regulation of commerce between the States, whether Congress has exercised the same power in question or left it free.

The inference from the various cases cited is that New Jersey, by the law above quoted, and by virtue of which she is attempting to destroy the franchises of the petitioners, has usurped the jurisdiction of Congress, and that we are authorized to interfere to prevent that usurpation from abridging one of the means of communication between New York and Philadelphia.

The committee find, therefore, that Congress has, in these cases, exercised the power which the petitioners ask may be interposed in their behalf, and that, both under the clause of the Constitution which authorizes it to establish post offices and post roads, and under the clause which authorizes it to regulate commerce, it has the clear right to grant petitioners the relief for which they pray. The committee find, moreover, that the State of New Jersey has, by her own legislative action, impliedly admitted the right of Congress to establish a railroad between New York and Philadelphia. By the sixth section of an act relating to the Camden and Amboy Railroad and Transportation Company, it is declared "that when any other railroad or roads for the transportation of passengers and property between New York and Philadelphia, across this State, shall be constructed and used for that purpose, under or by virtue of any law of this State or *the United States authorizing or recognizing said road*, that then, and in that case, the said dividends shall no longer be payable to the State, and the said stock shall be retransferred to the company by the treasurer of this State."

The committee come now to consider the question whether the present application presents a proper case for the exer-

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cise of the powers which it has already been shown Congress possesses. In answering this question it should be borne in mind that the exercise of this power is invoked, not only by the petitioners, but also by the government, and by the travelling and trading community, who now earnestly seek new channels of communication between New York and Washington. It appears by a letter addressed by General Meigs to the special committee investigating the propriety of establishing a new railroad between here and New York, that the government requires not only all the available means, but additional facilities, for the transportation of troops and munitions of war over the line which is partly covered by the roads of the petitioners, and that it has more than once been constrained to relieve the existing lines by water conveyance of troops to the capital. It also appears that during the recent freezing of the Potomac, the insufficiency of our means of transportation for military purposes was painfully apparent, and I have already stated that on one memorable occasion, when great promptness and great exertions were required, the petitioners greatly aided the government in the conveyance of troops and warlike material to the seat of war, and their reward has been an injunction from through transportation, and an order to account to the Camden and Amboy company for the money which they received for this service. No matter how urgent the emergency; no matter how imperative the demands of the army for re-enforcements; the roads of the petitioners are now closed, not only against the government, but against the citizens of every State; and troops, munitions of war, and travellers, are only permitted to pass from New York to Philadelphia over the roads of the monopoly. The quartermaster's department of the city of New York a few days ago applied to the petitioners to transport a regiment to Philadelphia, and the application was denied, because

such transportation had been enjoined by the chancellor of New Jersey.

In this connexion it is worthy of remark that since the injunction the rates of traffic upon the Camden and Amboy railroad have been unexpectedly and suddenly advanced.

The fact that additional accommodations for trade and travel between New York and Philadelphia is demanded as well by the government as for public convenience, is supported by the action of Congress and of the legislatures of the States.

On the 12th of the present month a resolution was passed by the House of Representatives which declares in its preamble "that the facilities for convenient and expeditious travel and transportation of troops between the cities of New York and Washington, especially between New York and Philadelphia, are at present notoriously inconvenient and inadequate."

Congress has also been officially informed that the legislatures of the States of Maine and New York have requested their representatives and instructed their senators to urge upon us the necessity for increasing the facilities for convenient and expeditious travel between the cities of New York and Philadelphia, and which, in the language of the resolutions, are stated to be "at present notoriously inconvenient and inadequate."

It has never been claimed that any State has the right to inhibit the transit across its territory of passengers and merchandise. The committee are unable to appreciate any distinction between a total inhibition of transit and the permission to use only a specified route, whose limited means virtually amount at least to a partial, if not a total, prohibition. Both the government and the public require con-

stant and prompt means of communication, and anything which prevents this is a prohibition which ought not to be tolerated.

Under the facts already stated, the question presented by the applicants resolves itself into this: Is it expedient for Congress to authorize a road which was legally constructed under proper State authority, and which has a legal right to transport passengers and merchandise from the Delaware river to Raritan bay, to commence such transportation from the city of Philadelphia, on the opposite side of the Delaware, and continue it to the city of New York, on the opposite shore of the Raritan? The necessities of the government, the necessities of the public, and the absolute rights of commercial intercourse, all require that this question should be answered in the affirmative.

The Committee on Military Affairs therefore unanimously recommend the passage of the accompanying bill.

TELEGRAPH ACT OF 1866

47 U.S.C. § 1. Use of public domain. Any telegraph company organized under the laws of any State, shall have the right to construct, maintain, and operate lines of telegraph through and over any portion of the public domain of the United States over and along any of the military or post roads of the United States which have been or may hereafter be declared such by law, and over, under, or across the navigable streams or waters of the United States; but such lines of telegraph shall be so constructed and maintained as not to obstruct the navigation of such streams and waters, or interfere with the ordinary travel on such military or post roads.

§ 2. Use of materials from public lands. Any telegraph company organized under the laws of any State shall have the right to take and use from the public lands through which its lines of telegraph may pass, the necessary stone, timber, and other materials for its posts, piers, stations, and other needful uses in the construction, maintenance, and operation of its lines of telegraph, and may preempt and use such portion of the unoccupied public lands subject to preemption through which their lines of telegraph may be located as may be necessary for their stations, not exceeding forty acres for each station; but such stations shall not be within fifteen miles of each other.

§ 3. Government, priority in transmission of messages. Telegrams between the several departments of the Government and their officers and agents, in their transmission over the lines of any telegraph company to which has been given the right of way, timber, or station lands from the public domain shall have priority over all other business, at such rates as the Postmaster General shall annually fix. And no part of any appropriation for the several departments of the Government shall be paid to any company which neglects or refuses to transmit such telegrams in accordance with the provisions of this section.

§ 4. Purchase of lines. The United States may, for postal, military, or other purposes, purchase all the telegraph lines, property, and effects of any or all companies acting under the provisions of sections 1 to 6 of this title, at an appraised value, to be ascertained by five competent, disinterested persons, two of whom shall be selected by the Postmaster General of the United States, two by the company interested, and one by the four so previously selected.

§ 5. Acceptance of obligation to be filed. Before any telegraph company shall exercise any of the powers or

privileges conferred by law such company shall file their written acceptance with the Postmaster General of the restrictions and obligations required by law.
(Act of July 24, 1866, 14 Stat. 221).

ILLINOIS REVISED STATUTES, 1955, BAR ASSN. ED.,
CHAPTER 411 1/2 :

56. Certificate of convenience and necessity.]

§55. No public utility shall begin the construction of any new plant, equipment, property or facility which is not in substitution of any existing plant, equipment, property or facility or in extension thereof or in addition thereto, unless and until it shall have obtained from the Commission a certificate that public convenience and necessity require such construction.

No public utility not owning any city or village franchise nor engaged in performing any public service or in furnishing any product or commodity within this State and not possessing a certificate of public convenience and necessity from the State Public Utilities Commission or the Public Utilities Commission, at the time this Act goes into effect shall transact any business in this State until it shall have obtained a certificate from the Commission that public convenience and necessity require the transaction of such business.

Whenever after a hearing the Commission determines that any new construction or the transaction of any business by a public utility will promote the public convenience and is necessary thereto, it shall have the power to issue certificates of public convenience and necessity.

SUPREME COURT, U. S.

Office - Supreme Court, U.S.

FILED

FEB 21 1958

IN THE

JOHN T. FEY, Clerk

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1957

No. 103

CITY OF CHICAGO,

Petitioner,

vs.

THE ATCHISON, TOPEKA AND SANTA FE
RAILWAY COMPANY, ET AL.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals
for the Seventh Circuit

No. 104

PARMELEE TRANSPORTATION CO.,

Appellant-Petitioner,

vs.

THE ATCHISON, TOPEKA AND SANTA FE
RAILWAY COMPANY, ET AL.,

Appellees-Respondents.

Appeal From and Writ of Certiorari to the United States Court
of Appeals for the Seventh Circuit

SUPPLEMENTAL BRIEF OF APPELLEES-RESPONDENTS UNDER RULE 41(5)

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Appeal From and Writ of Certiorari to the United States Court
of Appeals for the Seventh Circuit

SUPPLEMENTAL BRIEF OF APPELLEES-RESPONDENTS UNDER RULE 41(5)

Pursuant to Rule 41(5) appellees-respondents file this supplemental brief to point out the application to the instant cases of the decision of this Court in *Staub v. City of Baxley*, January 13, 1958.

There the Court held invalid under the First and Fourteenth Amendments an ordinance that required a permit

to solicit memberships in any dues-paying organization and gave the Mayor and city council discretionary power to deny the permit. Several arguments advanced unsuccessfully by the City of Baxley are similar to contentions urged here by petitioner and appellant.

1.

The Court held that a licensing ordinance which on its face violates the Constitution may be attacked on Constitutional grounds without first applying for a license, citing, *inter alia*, *Smith v. Cahoon*, 283 U.S. 553, 562. *Smith v. Cahoon* held that a statute invalid on its face because it imposed, as in the instant case, an unconstitutional requirement of proof of public convenience and necessity, could be assailed successfully by a motor carrier who had not applied for a license under it.

The first requirement of the *Baxley* ordinance, preliminary to compliance with or benefit of any of its other terms, was an application to the Mayor and city council for a permit which they could grant or deny in their discretion. This first requirement in itself, the Opinion makes clear, was an unconstitutional demand because it called for submission to a scheme for unlawful control of constitutional rights. This first unconstitutional demand thus blocked the way to compliance with or benefit of any part of the *Baxley* ordinance.

The Court of Appeals in the instant cases held squarely in accord with *Staub v. City of Baxley* and similar earlier cases. It said, R. 211-212, 240 F. 2d p. 941:

"We hold that it was unnecessary for Transfer to apply for licenses under the 1955 ordinance, because the issuance thereof unlawfully required a consent by

the city to the prosecution of Transfer's business and was not merely a step in the regulation thereof." (Emphasis added.)

It was urged by the City of Baxley that appellant Staub had not adequately presented a Constitutional question under Georgia procedure in that she had not attacked "specific sections" of the ordinance. This Court rejected that contention, pointing out that—

"The several sections of the ordinance are interdependent in their application to one in appellant's position and constitute but one complete act for the licensing and taxing of her described activities."

Hence the first unconstitutional demand, submission of an application for a permit, pervaded the entire ordinance and forestalled consideration of the other "interdependent" sections of the ordinance, either as a matter of court procedure or by way of administrative handling by the Baxley authorities.

The *Baxley* case thus emphasizes that there is no merit in the claims of petitioner and appellant that appellees respondents were required, before attacking the Constitutionality of the Chicago ordinance, to "exhaust their administrative remedies" by making an application under § 28-31.1 of the ordinance (R. 44-45) for a certificate of public convenience and necessity to conduct interstate commerce. Section 28-31.1 has all of the unconstitutional features of the *Baxley* ordinance plus several additional ones. And § 28-31.1, like the application provision of the *Baxley* ordinance, blocks the way to compliance with or administrative consideration of *any* of the other provisions of Chicago's Chapter 28 (R. 171) by demanding at the threshold submission to a scheme for the unlawful control of an applicant's Constitutional rights.

Comparison of the *Baxley* ordinance (footnote 1 of the Court's Opinion) with § 28-31.1 of the Chicago ordinance (R. 44-45) discloses that the features of the *Baxley* ordinance to which the Court directs particular attention because of Constitutional invalidity are present in § 28-31.1 and make it equally invalid.

Thus the Court said in the *Baxley* Opinion:

"It is settled by a long line of recent decisions of this Court that ~~an ordinance~~ which, like this one, makes the peaceful enjoyment of freedoms which the Constitution guarantees contingent upon the uncontrolled will of an official—as by requiring a permit or license which may be granted or withheld in the discretion of such official—is an ~~unconstitutional~~ censorship or prior restraint upon the enjoyment of those freedoms."

In conformity with the principles of the *Baxley* case expressed in many earlier similar decisions of this Court, the Court of Appeals said in part in holding § 28-31.1 of the Chicago ordinance unconstitutional:

"2. We conclude that Transfer is an instrumentality used by Terminal Lines in interstate commerce and is subject to control of the federal government. We also conclude that the city can neither give nor take away such authority of Transfer to operate * * *"
(R. 205, 240 F. 2d p. 938)

* * *

"Even if § 28-4.1 and § 28-17 are violated, that fact does not empower the city to bar, or even suspend, the operations of Transfer. *Castle v. Hayes Freight Lines*, 348 U.S. 61. The fact that Hayes was operating trucks under a federal certificate of convenience and necessity, under Part II of the Interstate Commerce Act, does not distinguish that case in principle from

the present case in which Transfer is engaged in a federally authorized activity. See 49 U.S.C.A. § 302 (c) (2), *supra*." (R. 209, 240 F. 2d p. 940)

Citing *Buck v. Kuykendall*, 267 U.S. 307, which held invalid a statute similar to § 28-31.1, the Court of Appeals quoted the following from this Court's Opinion describing the statute, p. 315 (R. 211, 240 F. 2d p. 941):

"* * * Its primary purpose is not regulation with a view to safety or to conservation of the highways, but the prohibition of competition. It determines not the manner of use, but the persons by whom the highways may be used. It prohibits such use to some persons while permitting it to others, for the same purpose and in the same manner. * * * Thus, the provision of the Washington statute is a regulation, not of the use of its own highways, but of interstate commerce. Its effect upon such commerce is not merely to burden but to obstruct it. Such state action is forbidden by the Commerce Clause: * * *"

The Court of Appeals followed the principles expressed now in *Staub v. Baxley* and its judgment should be affirmed. Compare *Staub v. Baxley* (1) with *Buck v. Kuykendall*, *supra*, 267 U.S. 307, and (2) with *Castle v. Hayes Freight Lines*, *supra*, 348 U.S. 61.

Respectfully submitted,

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APR 12 1957

JOHN T. FEY, Clerk

IN THE
Supreme Court of the United States

OCTOBER TERM, 1956

No. ~~103~~ 104

PARMELÉE TRANSPORTATION Co.,

Petitioner,

vs.

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY Co., ET AL.,
Respondents.

**PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT.**

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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1956.

2

No.

PARMELEE TRANSPORTATION CO.,

Petitioner,

vs.

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY CO., ET AL.,
Respondents.

**PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT.**

Parmelee Transportation Company respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit, entered in the above cause on the 17th day of January 1957.

Opinions Below.

The opinion of the United States District Court for the Northern District of Illinois, Eastern Division, is reported at 136 F. Supp. 476. The opinion of the United States Court of Appeals for the Seventh Circuit is not yet reported and is attached hereto as Appendix B, p. 18a-33a, *infra*.

Jurisdiction.

The judgment of the Court of Appeals for the Seventh Circuit was entered on January 17, 1957 (*infra*, Appendix B, p. 18a-33a). A petition for rehearing was denied on February 20, 1957. The jurisdiction of this Court is invoked pursuant to 28 U. S. C. § 1254 (1). Jurisdiction of the District Court was invoked pursuant to 28 U. S. C. §§ 1331, 1337. Jurisdiction of the Court of Appeals was invoked pursuant to 28 U. S. C. § 1291.

Questions Presented.

The following questions are presented by this appeal:

1. Whether the Court of Appeals erred in holding that the City of Chicago could not constitutionally require the appellee Railroad Transfer Service, Inc., a non-certificated motor carrier engaged primarily in interstate commerce wholly within the City of Chicago, to secure a license in order to use the public streets and highways within that city, where the license requirement was a means of effectuating a plan of regulation relating to traffic control, public safety, and maintenance of the streets and highways within the City of Chicago.

2. Whether the Court of Appeals erred in gratuitously anticipating a constitutional question by not requiring the appellee Railroad Transfer Service, Inc. to exhaust its administrative remedies by applying for a license as required by the Municipal Code of the City of Chicago, §§ 28-1 through 28-32.

3. Whether the Court of Appeals erred in imputing improper motives to the City Council of the City of Chicago in order to hold that the ordinance in question was unconstitutional as applied to the appellee Railroad Transfer Service, Inc.

4. Whether the Court of Appeals erred in substituting its judgment for that of the City Council of the City of Chicago with respect to whether the licensing of motor vehicles performing transfer services within the City of Chicago was an appropriate means of effectuating the police power of the City of Chicago, exercised for the purpose of controlling traffic, effecting public safety and maintaining streets and highways within the City of Chicago.

Statutes and Regulations Involved.

Section 28-1 through 28-32 of the Municipal Code of the City of Chicago. The ordinance is set forth in Appendix A *infra*, p. 1a-17a.

Statement.

The facts are not in dispute.

In the central business district of Chicago there are eight railroad passenger terminals, each of which is used by one or more of the twenty-one terminal lines serving the city. None of the terminal lines operates through the city. A through passenger (*i.e.*, one whose journey both begins and ends at points other than Chicago) travels on an interline ticket and must change trains at Chicago. When the incoming line and the outgoing line use different terminals, arrangements have been made for the transportation of through passengers and their baggage from one terminal to another. Basically, such transportation constitutes the "terminal services" which are involved in this case, although in a broader sense "terminal services" includes also transfer between railroad terminals and steamship docks, and between terminals or docks and other points in the central business district. Ninety-nine percent of the passengers using these transfer services are traveling in interstate commerce.

The railroads have undertaken to arrange transfer services in Chicago instead of leaving it to the passenger to make his own arrangements for getting from one terminal to another. They have, at least since 1916, published tariffs permitting the inclusion of the transfer service in the fare, and the normal practice is to include in the interline ticket a coupon entitling the passenger to transfer between terminals. In modern times the only practicable means of transfer has been by motor vehicle operating on the streets of Chicago, and the railroads have contracted with motor carriers to provide the service.

For more than a century prior to 1955, transfer services were provided by Parmelee Transportation Company and its predecessors. *Status of Parmelee Transportation Company*, 288 I.C.C. 95 (1953). The vehicles employed have always been regarded as public passenger vehicles for hire, and have been regulated by the City of Chicago under a comprehensive scheme for the regulation of such vehicles. While Parmelee supplied the services it operated in compliance with the regulations prescribed by the City, and the validity of those regulations was not questioned.

It is important to summarize the regulatory situation as it existed in 1955.

Chapter 28 of the Chicago Municipal Code dealt with public passenger vehicles generally, and specifically with livery vehicles, sight-seeing vehicles, taxicabs, and terminal vehicles. A terminal vehicle was defined as "a public passenger vehicle which is operated under contracts with railroad and steamship companies, exclusively for the transfer of passengers from terminal stations." (Section 28-1.) Section 28-2 prohibited the operation of any vehicle for the transportation of passengers for hire on the streets of the city unless it was licensed by the City as a public passenger vehicle.

Section 28-4 provided that no vehicle should be licensed until, after inspection by the public vehicle license commissioner, it had been found to be in safe operating condition and to have adequate body and seating facilities.

Section 28-4.1 conditioned the license on compliance with further specifications for safety, relating to the adequacy of doors and aisle space.

Section 28-5 required the application for a license to be in writing and to give certain information concerning the applicant and the vehicle to be licensed.

Section 28-6 required the commissioner to investigate the "character and reputation of the applicant as a law abiding citizen; the financial ability of the applicant to render safe and comfortable transportation service, to maintain or replace the equipment for such service and to pay all judgments and awards which may be rendered for any cause arising out of the operation" of the vehicle.

Section 28-7 imposed an annual license fee.

Section 28-12 required proprietors of public passenger vehicles to carry public liability and property damage insurance and workmen's compensation insurance, with solvent and responsible insurers approved by the commissioner. The amount of insurance to be carried and certain provisions of the policy were specified. Policies were required to be filed with the commissioner, and provision was made for the filing of an acceptable surety bond in lieu of insurance.

Section 28-13 required the payment of all judgments arising from operation of the vehicle to be paid within 90 days, irrespective of indemnity from insurance.

Section 28-14 provided for suspension of the license if, in the judgment of the commissioner, a vehicle was found unfit for use.

Section 28-15 specified various grounds for license revocation.

Section 28-31 provided:

"No person shall be qualified for a terminal vehicle license unless he has a contract with one or more railroad or steamship companies for the transportation of their passengers from terminal stations.

"It is unlawful to operate a terminal vehicle for the transportation of passengers for hire except for their transfer from terminal stations to destinations in [the central business district]."

Section 28-32 provided fines for the violation of any provision for which another penalty was not specified, and declared that each day of continuance of a violation should be a separate offense.

On June 13, 1955, the railroads notified Parmelee of their decision to terminate its contract for the furnishing of transfer services effective September 30, 1955. The railroads entered into a new contract for the supply of these services with Railroad Transfer Service, Inc., a corporation organized for the purpose.

On July 26, 1955, the City Council amended Chapter 28 of the Municipal Code and effected certain changes in the provisions relating to terminal vehicles. The amendment was in three parts:

(1) The definition of "terminal vehicle" in Section 28-1 was changed so as to eliminate the reference to contracts with railroad and steamship companies.

(2) Section 28-31 was amended to drop the requirement that, to be eligible for a terminal vehicle license, a person must have a contract with one or more railroad or steamship companies.

— 3 —

(3) A new section (28-31.1) was added. Its importance in this action requires that it be set out in full:

"28-31.1. Public Convenience and Necessity. No license for any terminal vehicle shall be issued except in the annual renewal of such license or upon transfer to permit replacement of a vehicle for that licensed unless, after a public hearing held in the same manner as specified for hearings in Section 28-22.1, the commissioner shall report to the council that public convenience and necessity require additional terminal vehicle service and shall recommend the number of such vehicle licenses which may be issued."

"In determining whether public convenience and necessity require additional terminal vehicle service due consideration shall be given to the following:

"1. The public demand for such service;

"2. The effect of an increase in the number of such vehicles on the safety of existing vehicular and pedestrian traffic in the area of their operation;

"3. The effect of an increase in the number of such vehicles upon the ability of the licensee to continue rendering the required service at reasonable fares and charges to provide revenue sufficient to pay for all costs of such service, including fair and equitable wages and compensation for licensee's employees and a fair return on the investment in property devoted to such service;

"4. Any other facts which the commissioner may deem relevant.

"If the commissioner shall report that public convenience and necessity require additional terminal vehicle service, the council, by ordinance, may fix the maximum number of terminal vehicle licenses to be issued not to exceed the number recommended by the commissioner."

Railroad Transfer Service, Inc. (Transfer) began operations under its contract with the railroads in October, 1955. Transfer never applied for public passenger vehicle licenses as required by Chapter 28 of the Municipal Code. On the contrary, it took the position that the ordinance did not apply to its operations under its contract with the railroads, and that, if the ordinance did apply to such operations, it was void as an attempt to regulate interstate commerce. The City having indicated its intention to enforce the ordinance against Transfer, the railroads and Transfer on October 24, 1955, filed their complaint against the City and its officials in the United States District Court for the Northern District of Illinois, seeking an injunction and a declaration that the ordinance was inapplicable or, in the alternative, that the ordinance was void as applied to the plaintiffs. Jurisdiction was invoked under Section 1331 of the Judicial Code, the requisite jurisdictional amount being in controversy, and under Section 1337.

On November 10, 1955, the district court entered an order permitting Parmelee to intervene as a defendant under the provisions of Rule 24 (b), Federal Rules of Civil Procedure.

On November 17, 1955, the City moved for summary judgment and on January 12, 1956, the court, finding no genuine issue of fact involved, entered its order of summary judgment in favor of the defendants and dismissed the action. The court had filed a memorandum opinion on December 12, 1955. On January 12, 1956, concurrently with its judgment order, the court filed a supplemental memorandum together with findings of fact and conclusions of law. The court held that the ordinance was applicable to Transfer, and that it was a proper exercise of police power by the City in the interest of public safety, health and welfare.

On January 13, 1956, the plaintiffs gave notice of appeal. On January 17, 1957, the United States Court of Appeals for the Seventh Circuit filed its opinion and order reversing the judgment of the district court and remanding the cause for further proceedings. The decision of the Court of Appeals was rested squarely on the invalidity of the ordinance under the Federal Constitution and laws.

On February 20, 1957, the Court of Appeals denied petitions for rehearing filed by the City and Parmelee, respectively.

REASONS FOR GRANTING THE WRIT.

I.

The City may require a license as a means of effecting police power controls over an interstate non-certificated carrier.

The Court of Appeals has stricken down the City's plan for regulating terminal vehicles in the interest of public safety and welfare, leaving this important branch of the public transportation of passengers for hire within the City unregulated by any governmental agency. In so doing, the Court of Appeals has decided an important constitutional question in a way in conflict with applicable decisions of this Court.

Essentially, the Court of Appeals' decision is based on the proposition that no state authority may require a license as a condition of the right to carry on an interstate business. This Court has repeatedly held otherwise.

Our precise position must be made clear at the outset. Throughout the course of this litigation the City and Parmelee have consistently urged upon the courts a modest but clear conception of the City's power to regulate the transfer services involved, expressly conceding the established limitations on that power. To quote from their brief in the Court of Appeals (pp. 10, 11):

"1. We *concede* that the city may not withhold a license to carry on interstate transfer operations

solely or even primarily on the ground that existing facilities are adequate, or that additional operations will adversely affect the competitive situation, or other such 'economic' grounds. *Buck v. Kuykendall*, 267 U. S. 307. (1925).

"2. We *concede* that the city may not, even in the enforcement of its lawful police regulations, withdraw the privilege of carrying on interstate transportation from a motor carrier holding a certificate of convenience and necessity issued by the Interstate Commerce Commission. *Castle v. Hayes Freight Lines, Inc.*, 348 U. S. 61 (1954)."

Railroad Transfer Service, Inc., does not hold a certificate of convenience and necessity from the Interstate Commerce Commission, and cannot obtain one. Its operations are not within the coverage of Part II of the Interstate Commerce Act, which regulates motor carriers. *Status of Parmelee Transportation Co.*, 288 I.C.C. 95, 104 (1953). While, therefore, the City may not condition Transfer's right to carry on its interstate operations upon a determination by the City that such operations are necessary and in the public interest in economic terms, the City has the right to impose reasonable regulations in the interest of public safety and welfare, and in the interest of conserving the public streets, and to require a license in aid of such a regulatory plan. The decisions of this Court so hold. The Court of Appeals ignored the distinctions which were so carefully made, and relied upon the inapposite decisions in *Buck v. Kuykendall* and *Castle v. Hayes Freight Lines, Inc.* to support its decision.

This Court's most recent decision in point is *Fry Roofing Co. v. Wood*, 344 U. S. 157 (1952). A Tennessee manufacturer was transporting his goods to Arkansas by truck under an arrangement which was found to make the owner-drivers of the trucks contract carriers. The truckers had

no permit or certificate from either the state or the Interstate Commerce Commission. Arkansas law required such carriers to obtain a permit, or "Certificate of Necessity and Convenience." The truckers sued to enjoin enforcement of the requirement, and the Arkansas Supreme Court dismissed the action. This Court affirmed. Four members of the Court, reading the statute as a regulation of interstate commerce indistinguishable from the Washington statute which was invalidated in *Buck v. Kuykendall*, dissented. The majority, however, accepting the interpretation placed upon the statute by state authorities, upheld the right of the state by requiring a "permit," to require registration in order that the state might properly apply its valid police, welfare, and safety regulations to motor carriers using its highways.

Concededly, the Chicago ordinance here in question involves more than a mere requirement of registration. It includes a registration requirement, and in other ways employs the licensing device in aid of valid regulations designed to promote public safety and welfare. As construed by the City and the District Court, it does not reserve to the City or its officials any discretionary power to deny a license on grounds such as those which were proscribed in *Buck v. Kuykendall*. The fact that the permit in the *Fry* case served only to insure a registration is not the significant factor in that case. What is significant is that the Court, following its previous decisions, there reaffirmed the power of the state to employ licensing as a sanction in aid of valid police regulations as applied to non-certificated carriers.

More significant than the holding of the *Fry* case itself is its reaffirmation of this Court's decision in *Columbia Terminals Co. v. Lambert*, 30 F. Supp. 28 (1939), decided by this Court on appeal 309 U.S. 620 (1940). This case is absolutely indistinguishable from the case at bar, and unequi-

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locally sustains the power of the state to employ licensing in aid of valid police regulation of noncertificated carriers.

A number of railroads having their eastern termini in St. Louis, Missouri, contracted with Columbia Terminals for the transportation of incoming through freight by motor truck across the Mississippi River to East St. Louis, Illinois. The freight was then carried to its destination by roads having their western termini at that point. Columbia was thus engaged in terminal transfer operations in all material respects identical with the operations of Transfer in this case. Its operations constituted a link in the chain of interstate commerce as clearly as do those of Transfer in this case. A Missouri statute required motor carriers to obtain a permit, to carry insurance, and to observe certain safety regulations. Columbia did not apply for a state permit. It did apply for a federal permit, but the Interstate Commerce Commission held, as it has held with respect to the transfer operations in this case, that the service was not subject to federal regulation under the Motor Carrier Act. When the state took steps to enforce the licensing requirement, Columbia sued for an injunction in a three-judge court. In a careful opinion, reviewing the pertinent decisions of this Court, the district court recognized that, under *Buck v. Kuykendall* and similar cases, the commerce clause is violated when a state "undertakes to exercise the right to say what interstate commerce will benefit the State and what will not." (30 F. Supp. at 32.) It held, however, that reasonable police regulations are not an unlawful burden upon interstate commerce and are justified so long as Congress has not occupied the field. (30 F. Supp. at 31.) So holding, the district court dismissed the bill for want of jurisdiction, because of the absence of a substantial federal question.

While the case was disposed of *Per Curiam* in this Court, it is apparent that the Court's disposition was a carefully considered one. The Court's order was: "The decree is vacated and the cause is remanded to the District Court with directions to dismiss on the merits." (309 U. S. 620.) In other words, the Court, while regarding the contentions made by Columbia as sufficiently substantial to support the jurisdiction of a three-judge court, unanimously agreed that the district court had rightly rejected those contentions on the merits, and had rightly upheld the validity of the state regulatory law.

The holding in *Columbia Terminals* was again approved in the *Fry* case, which contains this Court's authoritative construction of that holding. The majority in the *Fry* case said:

"In *Columbia Terminals Co. v. Lambert*, 30 F. Supp. 28, the District Court upheld a Missouri statute reading: 'It is hereby declared unlawful for any motor carriers . . . to use any of the public highways of this state for the transportation of persons or property, or both, in interstate commerce without first having obtained from the commission a permit so to do. . . .' *Buck v. Kuykendall*, 267 U. S. 307, was held not to require the statutes' invalidation, since Missouri had not refused to grant a permit on the ground that the state had power to say what interstate commerce would benefit the state and what would not. Agreeing with this constitutional holding, we ordered the complaint dismissed." (344 U. S. 157, 162, note 5.)

The minority in the *Fry* case also referred to *Columbia Terminals*:

"*Columbia Terminals Co. v. Lambert*, 30 F. Supp. 28, whose ruling we sustained, 309 U. S. 620, is not in point. The Interstate Commerce Commission had ruled in that case that the particular operations there involved were not covered by the Federal Act. See 30 F. Supp., at 30." (344 U. S. 157, 166, note 3.)

Thus, while four members of the Court were of opinion that the doctrine of *Columbia Terminals* did not apply to a noncertificated carrier subject to the Motor Carrier Act, all members of the Court reaffirmed the doctrine of that case and its application to carriers *not subject* to the act. We reiterate that the Interstate Commerce Commission has held that the terminal transfer services engaged in by Transfer are not subject to regulation under Part II of the Interstate Commerce Act, covering motor carriers, just as it held that Columbia's terminal transfer services were not subject to regulation under the Motor Carrier Act.

The teaching of the cases is clear. No state or city can withhold a permit to engage in interstate motor transportation on the ground that the state has power to say what interstate commerce will benefit the state and what will not—i.e., to deny a permit on "economic" grounds. But where a carrier does not hold a certificate from the Interstate Commerce Commission—or, at least, where the carrier is not subject to regulation as a motor carrier by the Commission—a state can employ licensing as a sanction for valid regulatory measures designed for the promotion of public safety and welfare.

The decision of the Court of Appeals is also in conflict with the following cases, which are to the same effect:

(1) *Eichholz v. Public Service Comm'n*, 306 U. S. 268 (1939) (upholding the power of Missouri to revoke a state permit to engage in interstate motor carrier operations where the carrier had violated state laws relating to intra-state operations; the carrier had applied for a certificate from the Interstate Commerce Commission, but the Commission had not acted on the application. The case is cited with approval in the *Fry* case, 344 U.S. at 162, note 5.)

(2) *H. P. Welch Co. v. New Hampshire*, 306 U.S. 79 (1939) (upholding the power of New Hampshire to suspend

the state "registration certificate" of an interstate motor carrier for violation of state law relating to hours of service for drivers. The violations occurred after the enactment of the Federal Motor Carrier Act, but before the effective date of regulations covering hours of service promulgated by the Interstate Commerce Commission. The principle, applicable to the instant case, is that, in the absence of applicable federal regulation, a state may employ licensing as a sanction for regulations designed to promote the public safety and welfare. The case is cited with approval in *Fry*, 344 U.S. at 162, note 5.)

(3) *McDonald v. Thompson*, 305 U.S. 263 (1938) (upholding the power of Texas to withhold a certificate from an interstate carrier on the ground that the proposed operations would subject the highways involved to excessive burden and would endanger and interfere with ordinary use by the public. The carrier was subject to, but had no certificate under, the Federal Motor Carrier Act. The Court also held that the carrier's interstate operations without the certificate required by Texas law did not qualify it as having been "in bona fide operation as a common carrier" under the "grandfather" clause of the Motor Carrier Act. The case is cited with approval in *Fry*, 344 U.S. at 162, note 5.)

(4) *Buck v. California*, 343 U.S. 99 (1952) (upholding the power of San Diego county to require a permit for taxicab operations in foreign commerce, as a sanction for standards relating to the service and public safety. Taxicabs, like terminal vehicles, are excluded from the coverage of Part II of the Interstate Commerce Act with exceptions not here material.)

The same principle was established prior to the enactment of the Federal Motor Carrier Act, and the cases so holding are still in point since that Act does not cover

the operations in question here; *Clark v. Poor*, 274 U.S. 554 (1927); *Hicklin v. Coney*, 290 U.S. 169 (1933); *Bradley v. Public Utilities Comm'n of Ohio*, 289 U.S. 92 (1933); *Continental Baking Co. v. Woodring*, 286 U.S. 352 (1932); and see *Texport Carrier Corp. v. Smith*, 8 F. Supp. 28 (D. C. S. D. Tex., 1934).

These principles were not affected by the decision of this Court in *Castle v. Hayes Freight Lines, Inc.*, 348 U.S. 61 (1954). That case held that a state could not *suspend* the privilege of a certificated interstate carrier to do business, and it implied that a state could not in the first instance withhold from such a carrier the privilege of doing interstate business, even as a sanction for the violation of valid police regulations. It is abundantly clear from a reading of the Court's opinion, however, that the principle is limited to carriers holding certificates of convenience and necessity from a federal agency, and has no application to carriers not holding such certificates and not eligible for them.

II.

The Ordinance has been misconstrued.

A matter of sheer logomachy has introduced confusion and error into the decision of the Court of Appeals, and should be clarified here once and for all. The Chicago ordinance here in question, in requiring licenses for terminal vehicles, speaks of a finding by the commissioner that public convenience and necessity require the service; and among the factors to which the commissioner is required to give "due consideration" is "The effect of an increase in the number of such vehicles upon the ability of the licensee to continue rendering the required service at reasonable fares and charges to provide revenue sufficient to pay for all costs of such service, including fair and equitable wages and compensation for licensee's employees and a fair return on the investment in property devoted to such service." (Municipal Code of Chicago,

Section 28-31.1. *Infra* p. 16a-17a) Read superficially, this language appears to authorize the commissioner to exercise a discretion on the basis of economic considerations, such as were proscribed by *Buck v. Kuykendall*. As this Court has often recognized, however, regulatory measures of this kind are commonly drawn for application to both intrastate and interstate operations; the term "public convenience and necessity" does not necessarily import the exercise of discretion on the basis of "economic" considerations; the validity of the regulation will be upheld so long as inappropriate provisions are not applied to interstate operations; and the courts will accept as authoritative the construction placed on the regulation by appropriate state officials, disclaiming power or intention to give the regulation unconstitutional application. In rejecting the interpretation placed on the ordinance by the City and its officials, and in presuming that the ordinance would be unconstitutionally applied, the Court of Appeals decided a federal question in a way in conflict with applicable decisions of this Court.

In the cases which have been cited, upholding state power to license interstate motor carriers in the interest of public safety and welfare and highway conservation, the statutory requirement normally was that the carrier obtain a certificate of public convenience and necessity. This was so in *Clark v. Poor*, 274 U.S. 554 (1927) (see Ohio Gen. Code, Section 614-87 (1929)); *Hicklin v. Coney*, 290 U.S. 169 (1933) (see S.C. Code 1932, Section 8510); *Bradley v. Public Utilities Comm'n of Ohio*, 289 U.S. 92 (1933); *Eichholz v. Public Utilities Comm'n of Missouri*, 306 U.S. 268 (1939); and *McDonald v. Thompson*, 305 U.S. 263 (1938). Sometimes, as in *Columbia Terminals Co. v. Lambert*, 30 F. Supp. 28 (E.D. Mo. 1939), *Buck v. California*, 343 U.S. 99 (1952), and *Fry Roofing Co. v. Wood*, 344 U.S. 157 (1952), the authority to operate has been designated

a "permit"; but that has not been a distinguishing factor. Typically, as in the *Columbia Terminals* case, the statute has also contained language specifying "economic" factors to be taken into consideration by the licensing official—language inappropriate to the exercise of the licensing power with respect to interstate carriers. But this Court has never decided the cases on merely literal grounds. This Court has never doubted that a "certificate of public convenience and necessity" may appropriately be withheld on grounds relating to the valid exercise of the police power, and has invalidated statutes requiring such certificates only when the carrier has been able to show, as in *Buck v. Kuykendall*, that the license has been denied on improper grounds.

(See also *Ex parte Truelock*, 139 Tex. Crim. Rep. 365, 140 S.W. 2d 167, 169 (1940); *Cannon Ball Transportation Co. v. Public Utilities Comm'n of Ohio*, 113 Ohio St. 565, 149 N.E. 713 (1925); *Wald Storage and Transfer Co. v. Smith*, 4 F. Supp. 61 (S.D. Tex., three-judge court 1933) aff'd 290 U.S. 596 (1933).)

In the Court of Appeals, the *Columbia Terminals* case—a powerful precedent, on all fours with the case at bar—was disposed of in a footnote (note 26) on the ground that, while the licensing statute spoke in terms of a finding of public benefit (i.e., of economic considerations), the state had expressly admitted that it lacked such power and made no such demand. But in this respect the cases are identical. In Appellees' Brief in the Court of Appeals, signed by John C. Melaniphy, Corporation Counsel and chief legal officer of the City of Chicago, representing the City, the Mayor, the Public License Commissioner, and the Commissioner of Police, there appears the following clear statement (at page 36):

"We concede that the city may not withhold a license to carry on interstate transfer operations solely or

even primarily on the ground that existing facilities are adequate; or that additional operations will adversely affect the competitive situation, or other such 'economic' grounds. *Buck v. Kuykendall*, 267 U.S. 307 (1925)."

In Part III of the same brief (pages 51-58) the appellees in the Court of Appeals, including the City and all appropriate officials thereof, urged that the proper construction of the ordinance was the one adopted by Judge LaBuy in the District Court, viz., that the ordinance did not authorize the withholding of a license on economic grounds, but only on considerations relating to public safety, traffic, and the conservation and maintenance of streets. Precisely as in *Columbia Terminals*, the City disclaims any and every authority or intention to give to the ordinance in question an unconstitutional application. It follows that the full force of the reasoning in *Columbia Terminals* is applicable to this case:

"The mere susceptibility of a statute to a construction which could render it unconstitutional does not afford sufficient ground for injunctive relief where, as here, it does not appear that the statute has ever been so construed, where the enforcing authorities affirm a recognition of its unconstitutionality if so construed and disclaim any intention of doing so, and where plaintiff's real ground for relief is not the application of the Statute to it." (30 F. Supp. at 32.)

Clark v. Poor, 274 U.S. 554 (1927), is also squarely in point. The Ohio statute required a certificate of public convenience and necessity. Without applying for a certificate, the carrier, engaged exclusively in interstate commerce, sought an injunction. A three-judge court dismissed the bill, and this Court affirmed, saying (at 556):

"It appeared that while the Act calls the certificate one of 'public convenience and necessity,' the Commis-

sion had recognized, before this suit was begun, that, under *Buck v. Kuykendall*, 267 U.S. 307 and *Bush v. Maloy*, 267 U.S. 317, it had no discretion where the carrier was engaged exclusively in interstate commerce, and was willing to grant to plaintiffs a certificate upon application and compliance with other provisions of the law."

The plaintiffs in that case also contended that the decree should be reversed because the statute provided that no certificate should issue until the carrier filed cargo insurance policies. This Court said:

"The lower court held that, under *Michigan Public Utilities Commission v. Duke*, 266 U.S. 570, this provision could not be applied to exclusively interstate carriers . . .; and counsel for the Commission stated in this Court that the requirements for insurance would not be insisted upon. Plaintiffs urge that because this was not conceded at the outset, it was error to deny the injunction. The circumstances were such that it was clearly within the discretion of the court to decline to issue an injunction . . ." (274 U.S. at 557-58.) (Emphasis ours)

In refusing to accept the construction placed upon the ordinance by responsible city officials, and in disregarding the canon that legislation is to be construed if possible to avoid constitutional questions, the Court of Appeals departed from salutary principles established by the decisions of this Court. See *Phyle v. Duffy*, 334 U.S. 431, 441 (1948); *Gerende v. Board of Supervisors of Elections of Baltimore City*, 341 U.S. 56, 57 (1951); *Fox v. Washington*, 236 U.S. 273 (1915); *Alabama State Federation of Labor v. McAdory*, 325 U.S. 450, 470 (1945).

III.

Administrative remedies were not exhausted.

In gratuitously anticipating constitutional questions, and in not requiring the plaintiffs to exhaust their administrative remedies, the Court of Appeals decided a constitutional question in a way in conflict with applicable decisions of this Court.

Since the City clearly has power, under the cases cited, to require a license as a means of enforcing valid regulations designed to promote public safety and welfare, the invalidation of the ordinance must rest upon apprehension that the ordinance will be unconstitutionally applied, despite the responsible assurances given by counsel that there is no such intention. Indeed, the opinion of the Court of Appeals appears to adopt the charge made by counsel for the railroads, that "as a purported safety measure, [the ordinance] is sham and spurious (p. 29a, *infra*); and that Court itself charges without qualification that the ordinance is an attempt to give Parmelee a monopoly of terminal vehicle licenses, "rather than an exercise of the city's police power over traffic." (p. 30a, *infra*.)

These are serious charges for any court to make against any legislative body. It is particularly regrettable that a United States court should make such charges against a city council, where the city and all its responsible officials have assured the court that they construe the ordinance otherwise, and where the parties invoking the jurisdiction of the court have failed and refused to apply for licenses. Not having applied for a license, Transfer is in the position of obdurately refusing the city's assurance that the ordinance will be applied constitutionally and in good faith, and of charging irresponsibly that the city will, "in the guise of an exercise of its police power, . . . cripple interstate commerce." (p. 29a, *infra*.) Throughout this litigation, the attack on the ordinance has been a com-

pound of speculation and conjecture. The argument has been that if Transfer were to apply for a license (which it has no intention of doing), the commissioner would deny the application, and that the evidence (which has not been introduced) in the record (which has not been made) before the commissioner could not support the action (which has not been taken) if it purported to rest on considerations of public safety and welfare as distinguished from prohibited economic considerations. The validity of the ordinance and the good faith of the city cannot be impugned in such a way.

We need not dwell on cases establishing the general principle that requires exhaustion of administrative remedies (*Myers v. Bethlehem Shipbuilding Corp.*, 303 U.S. 41 (1938); *Aircraft and Diesel Equipment Corp. v. Hirsch*, 331 U.S. 752 (1947)); the exact question as it is presented in this case has been decided by this Court. The situation here is identical with that in *Columbia Terminals Co. v. Lambert*, 30 F. Supp. 28, aff'd 309 U.S. 620 (1940). There the district court said:

"One who is within the terms of a statute, valid upon its face, that requires a license or certificate as a condition precedent to carrying on business may not complain because of his anticipation of improper or invalid action in administration [cited cases omitted]. The plaintiff has neglected to make application for a permit covering its operations. . . . Until it does so, it is not in position to invoke the injunctive powers of this Court to restrain the enforcement of the State laws. 'The long-settled rule of judicial administration [is] that no one is entitled to judicial relief . . . until the prescribed administrative remedy has been exhausted.' " (30 F. Supp. at 33-34.)

Among the cases which have been cited herein, not one has held unconstitutional a state statute or municipal ordinance requiring a license for interstate motor carrier op-

erations in the absence of an application for a license and a denial on unconstitutional grounds. The cases holding licensing laws invalid are all cases in which the carrier followed the appropriate procedure, pursued his administrative remedies, applied for a license, made a record suitable for judicial review, and presented the reviewing court with evidence that the license had been denied or withdrawn on unconstitutional grounds. Where the carrier has sought relief by injunction or otherwise without pursuing his administrative remedies, relief has been denied.

In *Buck v. Kuykendall*, 267 U.S. 307 (1925), where the Court held the licensing requirement invalid, it acted on the basis of a record showing the denial of a license and the grounds for denial. The same is true of *Bush v. Maloy*, 267 U.S. 317 (1925).

On the other hand, in *Continental Baking Co. v. Woodring*, 286 U.S. 352 (1932), where the carrier sought an injunction without applying for a license, relief was denied. In *Hicklin v. Coney*, 290 U.S. 169 (1933), where the carrier, without applying for a license, resisted an enforcement proceeding on the ground of invalidity, the defense failed. In *McDonald v. Thompson*, 305 U.S. 263 (1938), where the carrier sought an injunction without applying for a license, relief was denied. In *Buck v. California*, 343 U.S. 99 (1952), the defendants asserted the invalidity of the statute as a defense to an enforcement proceeding. While they had made oral applications for licenses, the ordinance required written applications, and the record failed to show the grounds for denial. The situation was equivalent to one in which no application had been made, and the defense failed. In *Fry Roofing Co. v. Wood*, 344 U.S. 157 (1952), the carrier sought an injunction without applying for a license, and relief was denied. Similarly, in *State v. Nagle*, 148 Me. 197, 91 A.2d 397 (1952), the carrier, with-

out applying for a license, asserted the invalidity of the ordinance as a defense to an enforcement proceeding. The defense failed, the court saying:

“Even though the issue of the permit is mandatory provided the condition of the highways to be used is such that it would be safe for the operation proposed, and the safety of other users of the highways would not be endangered thereby, the Public Utilities Commission under the statute here in question has not only the duty but the power and authority to determine these questions as questions of fact.” (148 Me. 197, 207-8, 91 A.2d 397, 402.)

To the same effect are *Lehon v. Atlanta*, 242 U.S. 53, 55-56 (1919); *Hall v. Geiger-Jones Co.*, 242 U.S. 539, 553-54 (1917); *Gundling v. Chicago*, 177 U.S. 183, 186 (1900).

The point is made with great clarity in *Clark v. Poor*, 274 U.S. 554 (1927). There the carrier, ignoring the provisions of the statute, operated without applying for a certificate, and sought injunctive relief against enforcement. There, as here and as in *Fry and Columbia Terminals*, the licensing laws read in terms of economic factors, as well as of valid police regulation, but the local authorities had disclaimed any authority or intention to withhold a license on grounds proscribed by *Buck v. Kuykendall*. Relief was denied. “The plaintiffs did not apply for a certificate or offer to pay the taxes. They refused or failed to do so, not because insurance was demanded, but because of their belief that, being engaged exclusively in interstate commerce, they could not be required to apply for a certificate or to pay the tax. Their claim was unfounded.” This Court’s disposition of that appeal furnishes, we submit, the model for the disposition of the appeal in this case:

“The decree dismissing the bill is affirmed, but without prejudice to the right of the plaintiffs to seek

appropriate relief by another suit if they should hereafter be required by the Commission to comply with conditions or provisions not warranted by law." (274 U.S. at 558.)

IV.

The judicial inquiry into legislative motives.

On the basis of certain records of the City Council and its committee on local transportation, the Court of Appeals attributed to the City Council improper motives in the enactment of the amendment of 1955, and on the basis of such supposed motives held invalid an ordinance otherwise valid. In so doing the Court of Appeals decided a federal question in a way in conflict with applicable decisions of this Court.

This Court has reiterated, time and again, that it is not the function of the federal courts to question the motives of legislatures. Only recently, speaking for the Court, Mr. Justice Frankfurter said:

"The holding of this Court in *Fletcher v. Peck*, 6 Cranch 87, 130, that it was not consonant with our scheme of government for a court to inquire into the motives of legislators, has remained unquestioned. See cases cited in *Arizona v. California*, 283 U.S. 423, 455." *Tenney v. Brandhove*, 341 U.S. 367, 377 (1951).

That this doctrine refers not only to the motives of federal legislators, which were involved in the *Brandhove* case, but to legislators of the states as well, is apparent not only from the reference to *Fletcher v. Peck*, but from the specific statement in *Arizona v. California*: "Similarly, no inquiry may be made concerning the motives or wisdom of a state legislature acting within its proper powers." 283 U.S. at 455, n. 7. Or to use Mr. Justice Holmes' language, in a case which, like this one, involved an attack on a legislature's amendment of its own legislation: "... we do not inquire into the knowledge, negligence, methods or

motives of the legislature if, as in this case, the repeal was passed in due form.” *Calder v. Michigan ex rel. Ellis*, 218 U.S. 591, 598. (1910).

Of the long series of cases substantiating the proposition that the Court of Appeals erred in looking beyond the legislation to the motives of the legislators, two more are of particular interest. In *Daniel v. Family Security Life Ins. Co.*, 336 U. S. 220 (1949), the contention was that the legislation in issue had been secured by competitors of the plaintiff in order to maintain their own preferred position rather than to abate evils which the state had the right to abate. The Court there sustained the regulation and stated:

“It is said that the ‘insurance lobby’ obtained this statute from the South Carolina legislature. But a judiciary must judge by results, not by the varied factors which may have determined legislators’ votes. We cannot undertake a search for motive in testing constitutionality.” (336 U.S. at 224.)

In *Railway Express Agency, Inc. v. New York*, 336 U.S. 106 (1949), an attack was made on a police regulation which forbade trucks to carry advertising on their sides unless the advertising was on behalf of the owner and operator of the trucks. The challenge was made, in part on the grounds of the Commerce Clause, that such a regulation could not possibly have anything to do with the exercise of the police power. In the course of its opinion the Court said:

“We would be trespassing on one of the most intensely local and specialized of all municipal problems if we held that this regulation had no relation to the traffic problem of New York City. It is the judgment of the local authorities that it does have such a relation. And nothing has been advanced which shows that to be palpably false.” (336 U.S. at 109.)

"The local authorities may well have concluded that those who advertise their own wares on their trucks do not present the same traffic problem in view of the nature or extent of the advertising which they use. It would take a degree of omniscience which we lack to say that such is not the case. If that judgment is correct, the advertising displays that are exempt have less incidence on traffic than those of appellants." (336 U.S. at 110.)

"It is finally contended that the regulation is a burden on interstate commerce in violation of Art. I, § 8 of the Constitution. Many of these trucks are engaged in delivering goods in interstate commerce from New Jersey to New York. *Where traffic control and the use of highways are involved and where there is no conflicting federal regulation, great leeway is allowed local authorities, even though the local regulation materially interferes with interstate commerce. The case in that posture is controlled by South Carolina State Highway Dept. v. Barnwell Bros., 303 U. S. 177.*" (336 U.S. at 111, emphasis added.)

See also *Breard v. Alexandria*, 341 U.S. 622, 639 (1951).

That Illinois law requires the same result is made abundantly clear by the long line of authorities cited in Judge LaBuy's opinion in the District Court. See 136 F. Supp. 476, at 483.

Furthermore, the Court of Appeals has misconceived and misconstrued the legislative history and purpose involved in the 1955 amendment. To the extent that this history has any pertinence, it reveals clearly that the City did not seek to grant an exclusive right to Parmelee or any other company, but that the City exercised its right to control the commercial use of its streets by terminal vehicles; sought to permit Parmelee to continue operating commercially over city streets without the necessity of a

contract with the railroads, and permitted additional licenses to be issued upon appropriate showing. Having broadened the scope of what constitutes terminal vehicles, the City set up a reasonable system for regulating the issuance of additional licenses. This is in line with action taken by the City Council in other similar situations involving the City's licensing powers.

In short, the Court of Appeals erroneously sought to determine the motive of the City Council in amending the ordinance; speculated erroneously on the nature of that motive, attributing illegal and improper motives to the City Council; and, disregarding the responsible assurances and commitments made to the court by the city's chief legal officer, struck down a valid ordinance on the basis of an unwarranted and presumptuous conviction that the ordinance, as a police measure, was "sham and spurious." In so doing, the court exceeded its judicial powers.

V.

The court substituted its judgment for that of the legislature.

In taking the position that no governmental control over the number of terminal vehicles in operation was necessary in order to avoid traffic congestion, protect the safety of the public, and preserve the streets of the city, and that the license requirement was not a necessary sanction for the implementation of the city's legitimate police powers, the Court of Appeals assumed to substitute its judgment for that of the Council on a matter clearly within the legislative discretion, and therefore decided a federal question in a way in conflict with applicable decisions of this Court.

At page 11 of its opinion the Court of Appeals says:

"To us it appears that the cost of maintaining the terminal vehicle service, which is initially borne by Transfer and ultimately, to the extent of coupons is-

sued and used, by the individual Terminal Lines, will operate effectively as an economic brake upon any unjustified increase in the number of such vehicles." (Appendix page 29a)

This is tantamount to a determination that regulation of the number of terminal vehicles in operation is unnecessary for protection of the public safety and for conservation of the streets. Such a determination calls for the exercise of legislative judgment. Regulation of the use of the streets is committed to the City Council, which has determined that regulation of such vehicles is necessary in the public interest. Moreover, the Court's statement overlooks those aspects of the ordinance which regulate aspects of the terminal vehicle business other than the mere number of vehicles employed.

At page 13 of its opinion the Court of Appeals says:

"If Transfer's vehicles do not conform to the requirements contained in the prior [sic] ordinance, the city may refuse to issue licenses for the nonconforming vehicles and penalize their unlicensed operation in accordance with § 28-32. So, also, whenever Transfer is found guilty of violating § 28-17 *the city may proceed against it according to the penalties section.*" (Emphasis supplied. Appendix page 31a)

Passing the point, which becomes clear on even a cursory reading of the ordinance, that licensing is in many respects the only effective implementation for the city's plan for regulating public passenger vehicles, it is abundantly clear that the court exceeded its judicial authority in passing judgment on the need for the license as a sanction. If, as we submit, the City has power to use the licensing sanction in furtherance of its legitimate police powers, it was not competent for the Court of Appeals to determine that that sanction is not to be employed because

direct remedies by way of fines for violations of the safety provisions of the ordinance are adequate. The choice of available sanctions to implement a regulatory scheme is surely a matter for legislative discretion alone. *Robinson v. United States*, 324 U. S. 282, 286 (1945); *Building Service Employers International Union, Local 262 v. Gazzam*, 339 U.S. 532, 540 (1950); *Watson v. Buck*, 313 U.S. 387, 403 (1941).

CONCLUSION.

The judgment of the Court of Appeals for the Seventh Circuit should be reversed and the judgment of the District Court for the Northern District of Illinois reinstated.

Respectfully submitted,

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APPENDIX A.

MUNICIPAL CODE OF CHICAGO CHAPTER 28

PUBLIC PASSENGER VEHICLES

- 28- 1. Definitions
- 28- 2. License required
- 28- 3. Interurban operations
- 28- 4. Inspections
- 28- 4.1. Specifications
- 28- 5. Application
- 28- 6. Investigation and issuance of license
- 28- 7. License fees
- 28- 8. Renewal of licenses
- 28- 9. Personal license—fair employment practice
- 28-10. Emblem
- 28-11. License card
- 28-12. Insurance
- 28-13. Payment of judgments and awards
- 28-14. Suspension of license
- 28-15. Revocation of license
- 28-16. Interference with commissioner's duties
- 28-17. Front seat passenger
- 28-18. Notice
- 28-19. Livery vehicles
- 28-19.1. Taximeter prohibited
- 28-19.2. Solicitation of passengers prohibited
- 28-20. Livery advertising
- 28-21. Sightseeing vehicles
- 28-22. Taxicabs
- 28-22.1. Public convenience and necessity
- 28-23. Identification of taxicab and cabman
- 28-24. Taximeters

- 28-25. Taximeter inspection
- 28-26. Tampering with meters
- 28-27. Taximeter inspection fee
- 28-28. Taxicab service
- 28-29. Group riding
- 28-29.1. Front seat passenger
- 28-30. Taxicab fares
- 28-31. Terminal vehicle
- 28-32. Penalty

28-1. As used in this chapter:

“Busman” means a person engaged in business as proprietor of one or more sightseeing buses.

“Cabman” means a person engaged in business as proprietor of one or more taxicabs or livery vehicles.

“Chauffeur” means the driver of a public passenger vehicle licensed by the city of Chicago as a public chauffeur.

“City” means the city of Chicago.

“Coachman” means a person engaged in business as proprietor of one or more terminal vehicles.

“Commissioner” means the public vehicle license commissioner, or any other body or officer having supervision of public passenger vehicle operations in the city.

“Council” means the city council of the city of Chicago.

“Livery vehicle” means a public passenger vehicle for hire only at a charge or fare for each passenger per trip or for each vehicle per trip fixed by agreement in advance.

“Person” means a natural person, firm or corporation in his own capacity and not in a representative capacity, the personal pronoun being applicable to all such persons of any number or gender.

“Public passenger vehicle” means a motor vehicle, as defined in the Motor Vehicle Law of the State of Illinois, which is used for the transportation of passengers for hire, excepting those devoted exclusively for funeral use or in operation of a metropolitan transit authority or public utility under the laws of Illinois.

"Sightseeing vehicle" means a public passenger vehicle for hire principally on sightseeing tours at a charge or fare per passenger for each tour fixed by agreement in advance or for hire otherwise at a charge for each vehicle per trip fixed by agreement in advance.

"Taxicab" means a public passenger vehicle for hire only at lawful rates of fare recorded and indicated by taximeter in operation when the vehicle is in use for transportation of any passenger.

"Taximeter" means any mechanical device which records and indicates a charge or fare measured by distance traveled, waiting time and extra passengers.

"Terminal vehicle" means a public passenger vehicle which is operated exclusively for the transportation of passengers from railroad terminal stations and steamship docks to points within the area defined in Section 28-31.

28-2. It is unlawful for any person other than a metropolitan transit authority or public utility to operate any vehicle, or for any such person who is the owner of any vehicle to permit it to be operated, on any public way for the transportation of passengers for hire from place to place within the corporate limits of the city, except on a funeral trip, unless it is licensed by the city as a public passenger vehicle.

It is unlawful for any person to hold himself out to the public by advertisement or otherwise as a busman, cabman or coachman or as one who provides or furnishes any kind of public passenger vehicle service unless he has one or more public passenger vehicles licensed for the class of service offered; provided that any association or corporation which furnishes call service for transportation may advertise the class of service which may be rendered to its members or subscribers, as provided in this chapter, if it assumes the liability and furnishes the insurance as required by section 28-23.

28-3. Nothing in this chapter shall be construed to prohibit any public passenger vehicle from coming into the city to discharge passengers accepted for transportation outside the city. While such vehicle is in the city no person

shall solicit passengers therefor and no roof light or other special light shall be used to indicate that the vehicle is vacant or subject to hire. A white card bearing the words "Not For Hire" printed in black letters not less than two inches in height shall be displayed on the windshield of the vehicle. Any person in control or possession of such vehicle who violates the provisions of this section shall be subject to arrest and fine of not less than fifty dollars nor more than two hundred dollars for each offense.

28-4. No vehicle shall be licensed as a public passenger vehicle until it has been inspected under the direction of the commissioner and found to be in safe operating condition and to have adequate body and seating facilities which are clean and in good repair for the comfort and convenience of passengers.

28-4.1. No vehicle shall be licensed as a livery vehicle or taxicab unless it has two doors on each side, and no vehicle having seating capacity for more than seven passengers shall be licensed as a public passenger vehicle unless it has at least three doors on each side or fixed aisle space for passage to doors.

28-5. Application for public passenger vehicle licenses shall be made in writing signed and sworn to by the applicant upon forms provided by the commissioner. The application shall contain the full name and Chicago street address of the applicant, the manufacturer's name, model, length of time in use, horse power and seating capacity of the vehicle applicant will use if a license is issued, and the class of public passenger vehicle license requested. The commissioner shall cause each application to be stamped with the time and date of its receipt. The applicant shall submit a statement of his assets and liabilities with his application.

28-6. Upon receipt of an application for a public passenger vehicle license the commissioner shall cause an investigation to be made of the character and reputation of the applicant as a law abiding citizen; the financial ability of the applicant to render safe and comfortable transportation service, to maintain or replace the equip-

ment for such service and to pay all judgments and awards which may be rendered for any cause arising out of the operation of a public passenger vehicle during the license period. If the commissioner shall find that the applicant is qualified and that the vehicle for which a license is applied for is in safe and proper condition as provided in this chapter, the commissioner shall issue a public passenger vehicle license to the owner of the vehicle for the license period ending on the thirty-first day of December following the date of its issuance, subject to payment of the public passenger vehicle license fee for the current year.

28-7. The annual fee for each public passenger vehicle license of the class herein set forth is as follows:

Livery vehicle	\$ 25.00
Sightseeing vehicle	125.00
Taxicab	40.00
Terminal vehicle	25.00

Said fee shall be paid in advance when the license is issued and shall be applied to the cost of issuing such license, including, without being limited to, the investigations, inspections and supervision necessary therefor, and to the cost of regulating all operations of public passenger vehicles as provided in this chapter.

Nothing in this section shall affect the right of the city to impose or collect a vehicle tax and any occupational tax, as authorized by the laws of the state of Illinois, in addition to the license fee herein provided.

28-8. All licenses for public passenger vehicles issued for the year 1951, which have not been revoked or surrendered prior to the time when such licenses for the year 1952 shall have been issued, may be renewed from year to year, subject to the provisions of this chapter.

28-9. No public passenger vehicle license shall be subject to voluntary assignment or transfer by operation of law, except in the event of the licensee's induction or recall into the armed forces of the United States for active duty or in the event of the licensee's death. In case of death the assignment shall be made by the legal represen-

tatives of his estate. No assignment shall be effective until the assignee shall have filed application for a license and is found to be qualified as provided in sections 28-5 and 28-6. If qualified the license shall be transferred to him by the commissioner, subject to payment of a transfer fee of \$50.00, the assumption by the assignee of all liabilities for loss or damage resulting from any occurrence arising out of or caused by the operation or use of the licensed public passenger vehicle before the effective date of the transfer and the approval by the commissioner of the insurance to be furnished by the busman, cabman or coachman as required by section 28-12.

It is unlawful for any busman, cabman or coachman to lease or loan a licensed public passenger vehicle for operation by any person for transportation of passengers for hire within the city. No person other than a chauffeur, who is either the busman, cabman or coachman or one hired by the busman, cabman or coachman to drive such vehicle as his agent or employee, in the manner prescribed by the busman, cabman or coachman, shall operate such vehicle for the transportation of passengers for hire within the city.

There shall be no discrimination by any busman, cabman or coachman against any person employed or seeking employment as a chauffeur with respect to hire, promotion, tenure, terms, conditions and privileges of employment on account of race, color, religion, national origin or ancestry.

28-10. The commissioner shall deliver with each license a sticker license emblem which shall bear the words "Public Vehicle License" and "Chicago" and the numerals designating the year for which such license is issued, a reproduction of the corporate seal of the city, the names of the mayor and the commissioner and serial number identical with the number of the public vehicle license. The predominant back-ground colors of such sticker license emblems shall be different from the vehicle tax emblem for the same year and shall be changed annually. The busman, cabman or coachman shall affix, or cause to be affixed, said sticker emblem on the inside of the glass part of the windshield of said vehicle.

28-11. In addition to the license and sticker emblem the commissioner shall deliver a license card for each vehicle. Said card shall contain the name of the busman, cabman or coachman, the license of the vehicle and the date of inspection thereof. It shall be signed by the commissioner and shall contain blank spaces upon which entries of the date of every inspection of the vehicle and such other entries as may be required shall be made. It shall be of different color each year. A suitable frame with glass cover shall be provided and affixed on the inside of the vehicle in a conspicuous place and in such manner as may be determined by the commissioner for insertion and removal of the public passenger vehicle license card; and in every livery vehicle and taxicab said frame shall also be provided for insertion and removal of the chauffeur's license card and such other notice as may be required by the provisions of this chapter and the rules of the commissioner. It is unlawful to carry any passenger or his baggage unless the license cards are exposed in the frame as provided in this section.

28-12. Every busman, cabman or coachman shall carry public liability and property damage insurance and workmen's compensation insurance for his employees with solvent and responsible insurers approved by the commissioner, authorized to transact such insurance business in the state of Illinois, and qualified to assume the risk for the amounts hereinafter set forth under the laws of Illinois, to secure payment of any loss or damage resulting from any occurrence arising out of or caused by the operation or use of any of the busman's, cabman's or coachman's public passenger vehicles.

The public liability insurance policy or contract may cover one or more public passenger vehicles, but each vehicle shall be insured for the sum of at least five thousand dollars for property damage and fifty thousand dollars for injuries to or death of any one person and each vehicle having seating capacity for not more than seven adult passengers shall be insured for the sum of at least one hundred thousand dollars for injuries to or death of more than one person in any one accident. Each vehicle having seating capacity for more than seven adult passen-

gers shall be insured for injuries to or death of more than one person in any one accident for at least five thousand dollars more for each such additional passenger capacity. Every insurance policy or contract for such insurance shall provide for the payment and satisfaction of any final judgment rendered against the busman, cabman or coachman and person insured, or any person driving any insured vehicle, and that suit may be brought in any court of competent jurisdiction upon such policy or contract by any person having claims arising from the operation or use of such vehicle. It shall contain a description of each public passenger vehicle insured, manufacturer's name and number, the state license number and the public passenger vehicle license number.

In lieu of an insurance policy or contract a surety bond or bonds with a corporate surety or sureties authorized to do business under the laws of Illinois, may be accepted by the commissioner for all or any part of such insurance; provided that each bond shall be conditioned for the payment and satisfaction of any final judgment in conformity with the provisions of an insurance policy required by this section.

All insurance policies or contracts or surety bonds required by this section, or copies thereof certified by the insurers or sureties, shall be filed with the commissioner and no insurance or bond shall be subject to cancellation except on thirty days' previous notice to the commissioner. If any insurance or bond is cancelled or permitted to lapse for any reason, the commissioner shall suspend the license for the vehicle affected for a period not to exceed thirty days, to permit other insurance or bond to be supplied in compliance with the provisions of this section. If such other insurance or bond is not supplied, within the period of suspension of the license, the mayor shall revoke the license for such vehicle.

28-13. All judgments and awards rendered by any court or commission of competent jurisdiction for loss or damage in the operation or use of any public passenger vehicle shall be paid by the busman, cabman or coachman within ninety days after they shall become final and not stayed

by supersedeas. This obligation is absolute and not contingent upon the collection of any indemnity from insurance.

28-14. If any public passenger vehicle shall become unsafe for operation or if its body or seating facilities shall be so damaged, deteriorated or unclean as to render said vehicle unfit for public use, the license therefor shall be suspended by the commission until the vehicle shall be made safe for operation and its body shall be repaired and painted and its seating facilities shall be reconditioned or replaced as directed by the commissioner. In determining whether any public passenger vehicle is unfit for public use the commissioner shall give consideration to its effect on the health, comfort and convenience of passengers and its public appearance on the streets of the city.

Upon suspension of a license for any cause, under the provisions of this chapter, the license sticker emblem shall be removed by the commissioner from the windshield of the vehicle and an entry of the suspension shall be made on the license card. If the suspension is terminated an entry thereof shall be made on the license card by the commissioner and a duplicate license sticker shall be furnished by the commissioner for a fee of one dollar. The commissioner shall notify the department of police of every suspension and termination of suspension.

28-15. If any summons or subpoena issued by a court or commission cannot be served upon the busman, cabman or coachman at his last Chicago address recorded in the office of the commission within sixty days after such process is delivered to the person authorized to serve it, and the busman, cabman, or coachman fails to appear in answer to such process for want of service, or if any busman, cabman or coachman shall refuse or fail to pay any judgment or award as provided in section 28-13, or shall lease or loan any of his licensed public passenger vehicles for operation by any person for hire or shall be convicted of a felony or any criminal offense involving moral turpitude, the mayor shall revoke all public vehicle licenses held by him.

If any public passenger vehicle license was obtained by application in which any material fact was omitted or

stated falsely, or if any public passenger vehicle is operated in violation of the provisions of this chapter for which revocation of the license is not mandatory, or if any public passenger vehicle is operated in violation of the rules and regulations of the commissioner relating to the administration and enforcement of the provisions of this chapter, the commissioner may recommend to the mayor that the public passenger vehicle license therefor be revoked and the mayor, in his discretion, may revoke said license.

Upon revocation of any license, the commissioner shall remove the license sticker emblem and the license card from the vehicle affected.

28-16. Every busman, cabman or coachman shall deliver or submit his public passenger vehicles for inspection or the performance of any other duty by the commissioner upon demand. It is unlawful for any person to interfere with or hinder or prevent the commissioner from discharging any duty in the enforcement of this chapter.

28-17. It is unlawful to permit more than one passenger to occupy the front seat with the chauffeur in any public passenger vehicle.

28-18. It is the duty of every busman, cabman or coachman to notify the commissioner whenever any change in his Chicago address is made. Any notice required to be given to the busman, cabman or coachman shall be sufficient if addressed to the last Chicago address recorded in the office of the commissioner.

28-19. No person shall be qualified for a livery vehicle license and a taxicab license at the same time; nor shall any person having a livery vehicle license be associated with anyone for sending or receiving calls for taxicab service.

No license for any livery vehicle shall be issued except in the annual renewal of such license or upon transfer to permit replacement of a vehicle for that licensed unless, after a public hearing, the commissioner shall determine that public convenience and necessity require additional

livery service and shall recommend to the council the maximum number of such licenses to be authorized by ordinance.

Not more than six passengers shall be accepted for transportation in a livery vehicle on any trip.

28-19.1. It is unlawful for any person to operate or drive a livery vehicle equipped with a meter which registers a charge or fare or indicates the distance traveled by which the charge or fare to be paid by a passenger is measured.

28-19.2. It is unlawful for any person to solicit passengers for transportation in a livery vehicle on any public way. No such vehicle shall be parked on any public way for a time longer than is reasonably necessary to accept passengers in answer to a call for service and no passengers shall be accepted for any trip in such vehicle without previous engagement for such trip, at a fixed charge or fare, through the station or office from which said vehicle is operated.

28-20. It is unlawful for the cabman of any livery vehicle, or the station from which it is operated to use the word "taxi", "taxicab" or "cab" in connection with or as part of the name of the cabman or his trade name.

The outside of the body of each livery vehicle shall be uniform black, blue or blue-black color. No light fixtures or lights shall be attached to or exposed so as to be visible outside of any livery vehicle, except such as are required by the law of the state of Illinois regulating traffic by motor vehicles and one rear red light in addition to those required by said law. No name, number or advertisement of any kind, excepting official license emblems or plates, shall be painted or carried so as to be visible outside of any livery vehicle.

It is unlawful for any person to hold himself out to the public by advertisement, or otherwise, to render any livery service unless he is the cabman of a licensed livery vehicle.

28-21. Sightseeing vehicles shall not be used for transportation of passengers for hire except on sightseeing tours or chartered trips. Passengers for sightseeing tours

shall not be solicited upon any public way except at bus stands specially designated by the council for sightseeing vehicles.

It is unlawful for any cabman or coachman to advertise his public passenger vehicle for hire on sightseeing tours.

28-22. Every taxicab shall be operated regularly to the extent reasonably necessary to meet the public demand for service. If the service of any taxicab is discontinued for any reason except on account of strike, act of God or cause beyond the control of the cabman, the commissioner may give written notice to the cabman to restore the taxicab to service, and if it is not restored within five days after notice, the commissioner may recommend to the mayor that the taxicab license be revoked and the mayor, in his discretion, may revoke same.

28-22.1. Not more than 3761 taxicab licenses shall be issued unless, after a public hearing, the commissioner shall report to the council that public convenience and necessity require additional taxicab service and shall recommend the number of taxicab licenses which may be issued. Notice of such hearing stating the time and place thereof shall be published in the official newspaper of the city at least twenty days prior to the hearing and by mailing a copy thereof to all taxicab licensees. At such hearing any licensee, in person or by attorney, shall have the right to cross-examine witnesses and to introduce evidence pertinent to the subject. At any time and place fixed for such hearing it may be adjourned to another time and place without further notice.

In determining whether public convenience and necessity require additional taxicab service, due consideration shall be given to the following:

1. The public demand for taxicab service;
2. The effect of an increase in the number of taxicabs on the safety of existing vehicular and pedestrian traffic;
3. The effect of increased competition,
 - (a) on revenues of taxicab licensees;

- (b) on cost of rendering taxicab service, including provisions for proper reserves and a fair return on investment in property devoted to such service;
 - (c) on the wages or compensation, hours and conditions of service of taxicab chauffeurs;
4. The effect of a reduction, if any, in the level of net revenues to taxicab licensees on reasonable rates of fare for taxicab service;
 5. Any other facts which the commissioner may deem relevant.

If the commissioner shall report that public convenience and necessity require additional taxicab service, the council, by ordinance, may fix the maximum number of taxicab licenses to be issued, not to exceed the number recommended by the commissioner.

-28-23. Every taxicab shall have the cabman's name, telephone number and the public passenger vehicle license number plainly painted in plain Gothic letters and figures of three-eighth inch stroke and at least two inches in height in the center of the main panel of the rear doors of said vehicle. In lieu of the cabman's telephone number the name and telephone number of any corporation or association with which the cabman is affiliated may be painted in the same manner, provided such corporation or association shall have assumed equal liability with the cabman for any loss or damage resulting from any occurrence arising out of or caused by the operation or use of any of the cabman's taxicabs and shall carry and furnish to the commissioner public liability and property damage insurance to secure payment of such loss or damage as provided in section 28-12. The public vehicle license number assigned to any taxicab shall be assigned to the same vehicle or to any vehicle substituted therefor upon annual renewal of the license. No other name, number or advertisement of any kind, excepting signs required by this chapter, official license emblems or plates and a trade emblem, in a manner approved by the commissioner, shall be painted or carried so as to be visible on the outside of any taxicab.

28-24. Every taxicab shall be equipped with a taximeter connected with and operated from the transmission of the taxicab to which it is attached. The taximeter shall be equipped with a flag at least three inches by two inches in size. The flag shall be plainly visible from the street and shall be kept up when the taxicab is for hire and shall be kept down when it is engaged.

Taximeters shall have a dial or dials to register the tariff in accordance with the lawful rates and charges. The dial shall be in plain view of the passenger while riding and between sunset and sunrise the dial shall be lighted to enable the passenger to read it.

It is unlawful to operate a taxicab for hire within the city unless the taximeter attached thereto has been sealed by the commission.

28-25. At the time a taxicab license is issued and semi-annually thereafter the taximeter shall be inspected and tested by the commissioner to determine if it complies with the specifications of this chapter and accurately registers the lawful rates and charges. If it is in proper condition for use, the taximeter shall be sealed and a written certificate of inspection shall be issued by the commissioner to the cabman. Upon complaint by any person that a taximeter is out of working order or does not accurately register the lawful rates and charges it shall be again inspected and tested and, if found to be in improper working condition or inaccurate, it shall be unlawful to operate the taxicab to which it is attached until it is equipped with a taximeter which has been inspected and tested by the commissioner, found to be in proper condition, sealed and a written certificate of inspection therefor is issued.

The cabman or person in control or possession of any taxicab shall deliver it with the taximeter attached or deliver the taximeter detached from the taxicab for inspection and test as requested by the commissioner. The cabman may be present or represented when such inspection and test is made.

28-26. It is unlawful for any person to tamper with, mutilate or break any taximeter or the seal thereof or to

transfer a taximeter from one taxicab to another for use in transportation of passengers for hire before delivery of the taxicab with a transferred taximeter for inspection test and certification by the commissioner as provided in section 28-25.

28-27. The fee for each certificate of inspection shall be three dollars, but no charge shall be made for any certificate when the inspection and test is made upon complaint, and it is found that the taximeter is in proper working condition and accurately registers the lawful rates and charges.

28-28. It is unlawful to refuse any person transportation to any place within the city in any taxicab which is unoccupied by a passenger for hire unless it is on its way to pick up a passenger in answer to a call for service or it is out of service for any other reason. When any taxicab in answering a call for service or is otherwise out of service it shall not be parked at a cabstand, and no roof light or other special light shall be used to indicate that the vehicle is vacant or subject to hire. A white card bearing the words "Not For Hire" printed in black letters not less than two inches in height shall be displayed on the windshield of such taxicab.

28-29. Group riding is prohibited in taxicabs, except as directed by the passenger first engaging the taxicab. Not more than five passengers shall be accepted for transportation on any trip; provided that additional passengers under twelve years of age accompanied by an adult passenger shall be accepted if the taxicab has seating capacity for them.

28-29.1. No passenger shall be permitted to ride on the front seat with the chauffeur of the taxicab unless all other seats are occupied.

28-30. Rates of fare for taxicabs shall be as follows:

For the first one-quarter of a mile or fraction thereof for one person25 cents

For each additional one-half of a mile or fraction thereof for one person10 cents

For each additional person of twelve years
or more for the whole trip10 cents.
For each three minutes of waiting time or
fraction thereof10 cents

Waiting time shall include the time beginning three minutes after call time at the place to which the taxicab has been called when it is not in motion, the time consumed by unavoidable delays at street intersections, bridges or elsewhere and the time consumed while standing at the direction of a passenger.

Every passenger under twelve years of age when accompanied by an adult shall be carried without charge.

Ordinary hand baggage of passengers shall be carried without charge. A fee of twenty-five cents may be charged for carrying a trunk, but no trunk shall be carried except inside of the taxicab.

Immediately on arrival at the passenger's destination it shall be the duty of the chauffeur to throw the taximeter lever to the non-recording position and to call the passenger's attention to the fare registered.

It is unlawful for any person to demand or collect any fare for taxicab service which is more or less than the rates established by the foregoing schedule, or for any passenger to refuse payment of the fare so registered.

28-31. Terminal vehicles shall not be used for transportation of passengers for hire except from *railroad terminal stations and steamship docks* to destinations in the area bounded on the north by E. and W. Ohio Street; on the west by N. and S. Desplaines Street; on the south by E. and W. Roosevelt Road; and on the east by Lake Michigan.

28-31.1. No license for any terminal vehicle shall be issued except in the annual renewal of such license or upon transfer to permit replacement of a vehicle for that licensed unless, after a public hearing held in the same manner as specified for hearings in Section 28-22.1, the commissioner shall report to the council that public convenience and necessity require additional terminal vehicle service and shall recommend the number of such vehicle licenses which may be issued.

In determining whether public convenience and necessity require additional terminal vehicle service due consideration shall be given to the following:

1. The public demand for such service;
2. The effect of an increase in the number of such vehicles on the safety of existing vehicular and pedestrian traffic in the area of their operation;
3. The effect of an increase in the number of such vehicles upon the ability of the licensee to continue rendering the required service at reasonable fares and charges to provide revenue sufficient to pay for all costs of such service, including fair and equitable wages and compensation for licensee's employees and a fair return on the investment in property devoted to such service;
4. Any other facts which the commissioner may deem relevant.

If the commissioner shall report that public convenience and necessity require additional terminal vehicle service, the council, by ordinance, may fix the maximum number of terminal vehicle licenses to be issued not to exceed the number recommended by the commissioner.

28-31-2. The rate of fare for local transportation of every passenger in terminal vehicles of the licensee shall be uniform, regardless of the distance traveled; provided that children under 12 years of age, when accompanied by an adult, shall be carried at not more than half fare. Such rates of fare shall be posted in a conspicuous place or places within each vehicle as determined by the commissioner.

28-32. Any person violating any provision of this chapter for which a penalty is not otherwise provided shall be fined not less than \$5.00 nor more than \$100.00 for the first offense, not less than \$25.00 nor more than \$100.00 for the second offense during the same calendar year, and not less than \$50.00 nor more than \$100.00 for the third and succeeding offenses during the same calendar year, and each day that such violation shall continue shall be deemed a separate and distinct offense.

APPENDIX B.

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 11692 SEPTEMBER TERM, 1956, SEPTEMBER SESSION, 1956.

THE ATCHISON, TOPEKA AND SANTA
FE RAILWAY, et al.,

Plaintiffs-Appellants,

v.

CITY OF CHICAGO, a municipal cor-
poration, et al.,

Defendants-Appellees,

and

P A R M E L E E TRANSPORTATION COM-
PANY,

Defendant-Intervenor-Appellee.

Appeal from the
United States Dis-
trict Court for the
Northern District
of Illinois, Eastern
Division.

January 17, 1957

Before MAJOR, SWAIM and SCHNACKENBERG, *Circuit Judges.*

SCHNACKENBERG, *Circuit Judge.* Twenty-one railroads,¹ herein sometimes referred to as Terminal Lines, and Rail-

¹ The Atchison, Topeka and Santa Fe Railway Company; The Baltimore and Ohio Railroad Company; The Chesapeake and Ohio Railway Company; Chicago, Burlington & Quincy Railroad Company; Chicago & Eastern Illinois Railroad Company; Chicago Great Western Railway Company; Chicago, Indianapolis and Louisville Railway Company; Chicago Milwaukee, St. Paul & Pacific Railroad Company; Chicago North Shore and Milwaukee Railway; Chicago and North Western Railway Company; Chicago, Rock Island & Pacific Railroad Company; Chicago South Shore and South Bend Railroad; Erie Railroad Company; Grand Trunk Western Railroad Company; Gulf, Mobile and Ohio Railroad Company; Illinois Central Railroad Company; Minneapolis, St. Paul & Sault Ste. Marie Railroad Company; The New York Central Railroad Company; The New York, Chicago and St. Louis Railroad Company; The Pennsylvania Railroad Company; and the Wabash Railroad Company.

road Transfer Service, Inc., sometimes herein referred to as Transfer, on October 24, 1955 brought an action in the district court against defendant City of Chicago, sometimes herein referred to as the city, and certain officials thereof.² Plaintiffs' complaint seeks a declaratory judgment and injunctive relief against the enforcement against them of an ordinance known as chapter 28 of the municipal code of Chicago, as amended by an ordinance enacted July 26, 1955. Plaintiffs asked the district court to declare by its judgment, *inter alia*, that the ordinance, as amended in 1955, is void as applied to them.

Parmelee Transportation Company, sometimes herein referred to as Parmelee, on its petition was granted leave to intervene as a defendant.³

On motion of defendants, other than Parmelee, pursuant to rule 56 of the federal rules of civil procedure,⁴ and on the pleadings, affidavits and exhibits submitted by all parties, the district court on January 12, 1956 granted a summary judgment against plaintiffs and dismissed their action.⁵ 136 F. Supp. 476. From said judgment this appeal was taken.⁶

The undisputed facts we now set forth.

There are eight passenger terminals in downtown Chicago, each being used by from one to six railroads. No one railroad passes through Chicago, but about 3900 railroad passengers daily travel through Chicago on continuous journeys which begin and end at points outside Chicago. At Chicago, they transfer from an incoming to an outgoing railroad. The only practical method of transferring

² Richard J. Daley, as mayor; John C. Melaniphy, as acting corporation counsel; Timothy P. O'Connor, as commissioner of police; and William P. Flynn, as public license commissioner.

³ The district court considered the petition as an answer to the complaint.

⁴ Fed. Rules of Civil Procedure, rule 56; 28 U.S.C.A.

⁵ On the same day the district court filed "findings of fact" and "conclusions of law", one conclusion being that there is no genuine issue of fact involved in this controversy.

⁶ On January 13, 1956 the district court ordered that defendants, other than Parmelee, be enjoined from enforcing the ordinance in question against plaintiffs upon the latter filing supersedeas bond of \$50,000. It is our understanding that this bond was filed.

these passengers between the different terminal stations is by motor vehicle equipped to carry them and their hand baggage simultaneously. More than 99 per cent of the passengers so transferred between terminal stations are traveling on through tickets between points of origin and destination located in different states. They are carried over public ways of the city.

Transfer began its operations on October 1, 1955, but has not applied to the city for public passenger terminal vehicle licenses. These transfer operations are required by a tariff filed with the Interstate Commerce Commission.⁷ They have been provided for by tariffs for more than the past forty years.

Pursuant to such tariffs a passenger traveling through Chicago purchases at his point of origin a railroad ticket composed of a series of coupons covering his complete transportation to his destination. If his through journey requires him to transfer from one railroad passenger terminal in Chicago to another, a part of his ticket consists of a coupon good for the transfer of himself and his hand baggage between such terminals. The expense of the required transfer service is absorbed by the railroads.

The tariffs provide that any such required transfer service shall be without additional charge where a one-way fare from Chicago to destination would be more than a specified minimum sum. Where such fare would be less

⁷ Local and Joint Passenger Tariff No. 3 governing, *inter alia*, passengers and baggage transfer between stations in Chicago, was filed with the Interstate Commerce Commission on behalf of Terminal Lines. On page 11 of said tariff, in Section 2 thereof, the Terminal Lines are listed according to the Chicago stations which they enter and it is set forth in Section 2 thereof that transfer is required between all railroad stations when transfer is necessary, and in Column 4 appears "Passenger transfer included", while in Column 5 there appears "Transfer of all baggage included".

Page 5 of said tariff in Section 1 thereof provides in rule 4, in part, as follows:

"Through Transportation. (a) Where it is designated in Column 4, Section 2, that passenger transfer is included, transfer coupon must be included in through ticket without additional collection."

And rule 6 in Section 1, in part, provides:

"Through Transportation. (a) Where it is designated in Column 5, Section 2, that baggage transfer is included, baggage may be checked through without additional collection."

than such minimum, a fixed charge which varies with the fare must be added to cover the required transfer service.

Prior to October 1, 1955, there had existed for many years arrangements between the Terminal Lines and Parmelee whereby it furnished this service for coupon-holding passengers. On June 13, 1955, the Terminal Lines ended their arrangement with Parmelee effective September 30, 1955. Under date of October 1, 1955, the Terminal Lines and Transfer executed a contract. In brief, this contract⁸ provides that, upon delivery of a transfer coupon to Transfer by a through-passenger, it will carry him and his hand baggage from the incoming to the appropriate outgoing station without charge. Transfer is compensated by the outgoing terminal railroad. Transfer is given the exclusive right to perform this transfer service. Transfer devotes its vehicles exclusively to service under the contract.⁹

On and prior to June 13, 1955, there was in effect an ordinance of the city, being said chapter 28 of the municipal code, consisting of sections 28-1 to 28-32,¹⁰ for the regulation of "Public Passenger Vehicles." Section 28-1 contained the following definitions, *inter alia*:

"'Public passenger vehicle' means a motor vehicle, as defined in the Motor Vehicle Law of the State of Illinois, which is used for the transportation of passengers for hire, excepting those devoted exclusively for funeral use or in operation of a metropolitan transit authority or public utility under the laws of Illinois."

* * *

"'Terminal vehicle' means a public passenger vehicle which is operated under contracts with railroad

⁸ On or about September 19, 1955, the railroads filed copies of the contract with the Interstate Commerce Commission and with the Illinois Commerce Commission.

⁹ The contract also provides that Transfer shall perform certain additional baggage transfer services for Terminal Lines. The transfer of a passenger's checked baggage by Transfer in vehicles other than "terminal vehicles", although covered by terms of the contract between Terminal Lines and Transfer, as well as actually performed by Parmelee prior to October 1, 1955, is not involved in this case.

¹⁰ Herein sometimes referred to as the prior ordinance.

and steamship companies, exclusively for the transfer of passengers from terminal stations."

Section 28-31 provided:

"28-31. No person shall be qualified for a terminal vehicle license unless he has a contract with one or more railroad or steamship companies for the transportation of their passengers from terminal stations.

"It is unlawful to operate a terminal vehicle for the transportation of passengers for hire except for their transfer from terminal stations to destinations in the area bounded on the north by E. and W. Ohio Street; on the west by N. and S. Desplaines Street; on the south by E. and W. Roosevelt Road; and on the east by Lake Michigan."

Certain other parts of chapter 28 incorporated regulations enacted pursuant to the police power of the city.¹¹

Parmelee was, on and prior to September 30, 1955, the only person having a transfer contract with the Terminal Lines and licensed to operate terminal vehicles under the ordinance.

At a meeting of the committee on local transportation of the Chicago city council held on July 21, 1955, the chairman stated that recently he had been advised by the Vehicle License Commissioner that he had received a communication from Parmelee advising that its contract with the railroads was to be canceled out in September of that year, "which would make it appear that the railroads were taking the position of dictating who would or could operate terminal vehicles in Chicago; that he did not think that was right and had prepared an ordinance with the assistance of Mr. Gross, and had it introduced in the city council and referred it to the committee; that subsequently he had discussed said ordinance with Mr. Grossman of

¹¹ These are provisions for granting and suspension of licenses, safety regulations based on the type of vehicle, number of passengers permitted, condition and maintenance of vehicles, inspection thereof, etc., financial responsibility of operators, investigation of character of prospective licensees and continuing supervision thereof, requirements for maintenance of adequate insurance, determination of public convenience and necessity with respect to number of certain intrastate vehicles, ~~as~~ livery and taxicabs, which are to be permitted on the city streets, and regulation of taxi fares through meters.

the corporation counsel's office and that, as a result of his conference with Mr. Grossman, it would appear that, while he was on the right track in the matter, his method of approach was wrong."

Mr. Grossman informed the committee that he had looked over the ordinance "as introduced" by the chairman and was of the opinion that it was not in proper form; but that he believed the objective could be obtained in some other way. He said he would endeavor to prepare and submit an ordinance on this subject.

The chairman's proposed ordinance, which met with Mr. Grossman's objection as to form, and which was laid aside, in brief would have granted an exclusive franchise for ten years to Parmelee for the operation of terminal vehicles to transfer passengers and their baggage between railroad stations.¹²

On July 26, 1955, the chairman stated that the committee was in session to receive a report from Mr. Grossman who had prepared a substitute ordinance which would accomplish what the committee had in mind, namely, placing the licensing and operation of terminal vehicles under the complete control of the city of Chicago, whereas, as the code then provided, the only one who could secure a license for the operation of a terminal vehicle was someone who had a contract with the railroads.

On recommendation of the committee, the council on the same day passed the ordinance now under attack.¹³

1. The city and Parmelee concede that Transfer is engaged in interstate commerce. In *United States v. Yellow*

¹² §2 read: "Subject to all the conditions of this ordinance, exclusive permission and authority is hereby granted to the licensee to operate terminal vehicles in the City for a period of ten (10) years, commencing on . . . , 1955, and ending on . . . , 1965."

§4 provided: "It is unlawful for any person to be an operator of one or more terminal vehicles on any public way from place to place within the corporate limits of the city unless such terminal vehicles are licensed by the City as terminal vehicles. * * *"

§11 provided: "Upon the effective date of this ordinance, the commissioner shall issue licenses hereunder to licensee in not to exceed the number of licenses held by such licensee on April 1, 1955. * * *"

¹³ Herein sometimes referred to as the 1955 Ordinance.

Cab Co., 332 U.S. 218, 228, Parmelee's operation (including that part now being carried on by Transfer) was held to be an integral step in an interstate movement and, therefore, a constituent part of interstate commerce.¹⁴ The court pointed out that Chicago is the terminus of a large number of railroads engaged in interstate passenger traffic and that a great majority of the persons making interstate railroad trips which carry them through Chicago must disembark from a train at one railroad station, travel from that station to another some two blocks to two miles distant, and board another train at the latter station; that Parmelee had contracted with the railroads to provide this transportation by special cabs carrying seven to ten passengers. The court said that Parmelee's contracts were exclusive in nature, adding:

"The transportation of such passengers and their luggage between stations in Chicago is clearly a part of the stream of interstate commerce. When persons or goods move from a point of origin in one state to a point of destination in another, the fact that a part of that journey consists of transportation by an independent agency solely within the boundaries of one state does not make that portion of the trip any less interstate in character. *The Daniel Ball*, 10 Wall. 557, 565. That portion must be viewed in its relation to the entire journey rather than in isolation. So viewed, it is an integral step in the interstate movement. See *Stafford v. Wallace*, 258 U.S. 495.

"Any attempt to monopolize or to impose an undue restraint on such a constituent part of interstate commerce brings the Sherman Act into operation. * * *

Obviously these holdings conform with the following well-established principles: (1) a state may not obstruct or lay a direct burden on the privilege of engaging in interstate commerce, *Furst v. Brewster*, 282 U.S. 493, 498; *Mich. Com. v. Duke*, 266 U.S. 570, 577, 69 L. ed. 445; but (2) nevertheless it may incidentally and indirectly affect it

¹⁴ The destination intended by the passenger when he begins his journey and known to the carrier, determines the character of the commerce, whether interstate or not. *Sprout v. South Bend*, 277 U.S. 163, 168.

by a bona fide, legitimate, and reasonable exercise of its police power. 15 C.J. S. 266. In *Dahnke-Walker Co. v. Bondurant*, 257 U.S. 282, 290, the court said:

"The commerce clause of the Constitution, Art. I, §8, cl. 3, expressly commits to Congress and impliedly withholds from the several States the power to regulate commerce among the latter. Such commerce is not confined to transportation from one State to another, but comprehends all commercial intercourse between different States and all the component parts of that intercourse. * * *"

The power here referred to may be exercised, not only in an act of Congress, but also in a regulation by the Interstate Commerce Commission. 15 C.J.S: 274.

Part I of the Interstate Commerce Act¹⁵ deals with railroads as well as other subjects not relevant here. §3 (3) thereof, in its presently pertinent provisions, appeared in the original act of February 4, 1887.¹⁶ It provides that all carriers of passengers subject to the act shall afford all reasonable facilities for the interchange of traffic between their respective lines and for the receiving, forwarding and delivering of passengers to and from connecting lines.¹⁷ *Central Transfer Co. v. Terminal R. R.*, 288 U.S. 469, 473, note 1.

Part II of the same act¹⁸ deals with motor carriers. As amended in 1940, 302(c)¹⁹ provides as follows:

§202(c) "Notwithstanding any provision of this section or of section 203, the provisions of this part, [Part II], except the provisions of section 204 relative to qualifications and maximum hours of service of employees and safety of operation and equipment, shall not apply—

¹⁵ 49 U.S.C.A. §§1-27.

¹⁶ §3, second unnumbered paragraph, 24 Stat. 380.

¹⁷ There is no warrant for limiting the meaning of "connecting lines" to those having a direct physical connection. The term is commonly used as referring to all the lines making up a through route. *Atlantic Coast Line R. Co. v. U. S.*, 284 U.S. 278, 293.

¹⁸ 49 U.S.C.A. §§301-327, (1951 ed.).

¹⁹ 56 Stat. 300, where this section is known as section 202(c).

“(1) to transportation by motor vehicle by a carrier by railroad subject to part I, * * * incidental to transportation or service subject * * * [thereto] in the performance within terminal areas of transfer, collection, or delivery services; but such transportation shall be considered to be and shall be regulated as transportation subject to part I when performed by such carrier by railroad * * *;

“(2) to transportation by motor vehicle by any person (whether as agent or under a contractual arrangement) for a common carrier by railroad subject to part I, * * * in the performance within terminal areas of transfer, collection, or delivery service; but such transportation shall be considered to be performed by such carrier * * * as part of, and shall be regulated in the same manner as, the transportation by railroad, * * * to which such services are incidental.”

In Part I, §6(1) of the Interstate Commerce Act²⁰ requires every common carrier to file with the commission tariffs (therein referred to as schedules), for transportation, including joint rates over through routes. In this respect a tariff is to be treated the same as a statute. *Pennsylvania R. Co. v. International Coal Min. Co.*, 230 U.S. 183, at 197, 57 E. ed. 1446, 1451.

Relevant tariffs were filed with the Interstate Commerce Commission on behalf of the Terminal Lines.

The agreement of October 1, 1955²¹ obligates Transfer to perform all the required passenger and hand baggage transfer service from the terminal station in Chicago of each incoming line to the terminal station in Chicago of each outgoing line, all at the expense of the latter, for the period beginning October 1, 1955 and ending September 30, 1960. This service (which has been since October 1, 1955 performed by Transfer) replaced the Parmelee service, with the exception of two types of operations local

²⁰ 49 U.S.C.A. §6(1).

²¹ The Baltimore and Ohio Chicago Terminal Railroad Company, Chicago and Western Indiana Railroad Company and Chicago Union Station Company, therein referred to as “depot companies”, are also parties to said agreement. That fact is not controlling in the decision of this case.

in their nature,²² consisting of (a) transportation of friends or relatives accompanying a coupon holder between stations, and (b) transportation of a coupon holder to any hotel or other terminus "in the loop district of Chicago", as requested of the driver by the coupon holder.

2. We conclude that Transfer is an instrumentality used by Terminal Lines in interstate commerce and is subject to control of the federal government. We also conclude that the city can neither give nor take away such authority of Transfer to operate and that the city has no power of control over Transfer, except the control which it has generally in exercising its police power pertaining to such matters as public safety, maintenance of streets and the convenient operation of traffic. For a more detailed statement of the scope of such police power, see *Continental Baking Co. v. Woodring*, 286 U.S. 352.

This is not a case in which a motor vehicle operator is denied the privilege of operating on a particular highway because of the congestion of traffic thereon, such as was true in *Bradley v. Public Utility Commission*, 289 U.S. 92, (on which, for some reason not clear to us, the city relies), but rather we have a case where an ordinance, in effect, bars Transfer from the entire network of highways within the downtown area of Chicago.

Pursuant to federal law, Terminal Lines have assumed an obligation to furnish the service in question as an interstation link in interstate commerce. The integration of this service with the complex, and occasionally changing, schedules of the Terminal Lines and the ebb and flow of passenger traffic existing in the various stations; requires a continuing and intimate knowledge thereof, which the Terminal Lines possess. The city is not equipped to function effectively in this area. It follows that the choice as to the instrumentality to be used for that purpose properly belongs to the Terminal Lines. These facts preclude the selection of an operator of terminal vehicles by anyone other than the Terminal Lines. While the city has power to regulate the operation of terminal vehicles incidently

²² See *Status of Parmelee Transp. Co.*, 288 I.C.C. 95, at 100.

to its regulation of street traffic generally, it has no power, directly or indirectly, to designate who shall own or operate such vehicles. The prior ordinance recognized this situation. It was limited to terminal vehicles having contracts with the Terminal Lines and, as to which vehicles, it exercised certain police powers of the city relating to traffic regulation. That ordinance made no attempt, and it was not intended, to select the operator of the service. In contrast, the 1955 ordinance consists of provisions which, in effect, name Parmelee as the exclusive operator of terminal vehicles in Chicago even though it has no contract with the Terminal Lines which are under a federally imposed obligation to furnish this terminal facility. Each of the Terminal Lines, which sells through tickets calling for interstate transportation in Chicago, thereby assumes an individual obligation to the passenger to furnish that service. Yet, under the 1955 ordinance, that railroad would have no direct control over the operator of that service and no opportunity to protect itself by an agreement indemnifying it from claims of passengers for damages arising out of the negligence of the operator. Other obvious considerations point to the practical necessity of a continuing control by the Terminal Lines of the instrumentality furnishing the service covered by the coupons sold by those lines to interstate passengers.

3. However, the city contends that the 1955 ordinance not only retains the police regulations of the prior ordinance, but demonstrates the city's concern with all passenger vehicles for hire, and specifically with the effect of the number of taxicabs as well as terminal vehicles on the safety of existing vehicular and pedestrian traffic. The city contends that in this respect the ordinance is valid as an exercise of the police power.

But the Terminal Lines argue that the 1955 ordinance was adopted for the sole and evident purpose, not of police power regulation, but of economic regulation. They say that, not only would the 1955 ordinance add nothing in respect to police power regulations that were not contained in the prior ordinance, but that the 1955 ordinance added

"elaborate requirements for proof of public convenience and necessity and other elements of economic regulation of interstate commerce * * *." They add "that these new economic regulations would apply to all except Parmelee; Parmelee was granted a perpetual franchise free from these requirements. The amendment eliminated the requirement that no one could obtain a license unless he had a contract for interstation transfer with the railroads. The amendment unmistakably marked the ordinance as an economic regulation not within the city's power."

Significant is §28-31.1 of the 1955 ordinance which provides that no license for any terminal vehicle shall be issued except in the annual renewal of such license or upon transfer to permit replacement of a vehicle for that licensed, unless, after a public hearing, the commissioner shall report to the council that public convenience and necessity require additional terminal vehicle service and shall recommend the number of such vehicle licenses which may be issued. It is further provided that, in determining whether public convenience and necessity require such additional service, the following, *inter alia*, shall be considered: "2. The effect of an increase in the number of such vehicles on the safety of existing vehicular and pedestrian traffic in the area of their operation; * * *".

Terminal Lines argue that these are the only provisions of the 1955 ordinance which could even appear to relate to public safety. But they aver that, as a purported safety measure, this is sham and spurious.

To us it appears that the cost of maintaining the terminal vehicle service, which is initially borne by Transfer and ultimately, to the extent of coupons issued and used, by the individual Terminal Lines, will operate effectively as an economic brake upon any unjustified increase in the number of such vehicles. Moreover, if and when a greater number is demanded by the growth of interstate passenger traffic, the city would then have no right, in the guise of an exercise of its police power, to cripple interstate commerce by preventing a justifiable increase in the number of such vehicles required to meet the needs of that commerce.

We are thus led to conclude that there is no valid legal basis for the above-cited provisions of §28-31.1 of the 1955 ordinance. We are convinced that those provisions, which would in effect limit the number of terminal vehicle licenses to those held by Parmelee on July 26, 1955 and give Parmelee perpetual control thereof, constitute a designation of Parmelee by the council of the city, in lieu of Transfer, the instrumentality selected by the Terminal Lines, rather than an exercise of the city's police power over traffic. In this critical aspect the 1955 ordinance is invalid. If there were any doubt that this conclusion is correct, the legislative history of the ordinance dispels that doubt.

At meetings of the committee which recommended the 1955 ordinance for passage, the committee chairman made it clear that the objective sought was the assumption by the city of the authority to designate the instrumentality which was to operate terminal vehicles between railroad stations in Chicago. The proceedings of the committee fail to indicate that the chairman or any member of the committee was interested in traffic regulations or any other aspect of the city's police power.

In attempting to justify the 1955 ordinance, which admittedly retained police regulations contained in the prior ordinance, the city points to photographs of two transfer vehicles which, the city says, do not comply with retained §28-4.1, which provides that no vehicle having a seating capacity for more than 7 passengers shall be licensed as a public passenger vehicle unless at least 3 doors on each side or a fixed aisle space is provided, and retained §28-17, which provides that it is unlawful to permit more than one passenger to occupy the front seat with the chauffeur. There is no indication in the record that any terminal vehicles used by Transfer, except the two appearing in the photographs, violate §28-4.1. Even if §28-4.1 and §28-17 are violated, that fact does not empower the city to bar, or even suspend, the operations of Transfer. *Castle v. Hayes Freight Lines*, 348 U.S. 61. The fact that Hayes was operating trucks under a federal certificate of convenience and necessity, under Part II of

the Interstate Commerce Act²³ does not distinguish that case in principle from the present case in which Transfer is engaged in a federally authorized activity. See 49 U.S.C.A. §302(c)(2), *supra*. If Transfer's vehicles do not conform to the requirements contained in the prior ordinance,²⁴ the city may refuse to issue licenses for the non-conforming vehicles and penalize their unlicensed operation in accord with §28-32. So, also, whenever Transfer is found guilty of violating §28-17 the city may proceed against it according to the penalties section.²⁵

Undoubtedly the city has power to require that one engaged exclusively in interstate commerce may be required to procure from the city a license granting permission to use its highways and in addition pay a license fee demanded of all persons using automobiles on its highways as a tax for the maintenance of the highways and the administration of the laws governing the same. Highways being public property, users of them, although engaged exclusively in interstate commerce, are subject to regulation by the state or municipality to ensure safety and convenience and the conservation of the highways. Users of them, although engaged exclusively in interstate commerce, may be required to contribute to their cost and upkeep. Common carriers for hire, who make the highways their place of business, may properly be charged a tax for such use. *Clark v. Poor*, 274 U.S. 554, 557.

Both the language of the 1955 ordinance and its legislative history point to the fact that it is not legislation governing the manner of conducting a business or providing for a contribution toward the expense of highway maintenance, but that it requires a license, the granting of which, in turn, is made dependent upon the consent of the

²³ 49 U.S.C.A. §301, *et seq.*

²⁴ Ch. 28, Chicago Municipal Code.

²⁵ §28-32. "Any person violating any provision of this chapter for which a penalty is not otherwise provided shall be fined not less than \$5.00 nor more than \$100.00 for the first offense, not less than \$25.00 nor more than \$100.00 for the second offense during the same calendar year, and not less than \$50.00 nor more than \$100.00 for the third and succeeding offenses during the same calendar year and each day that such violation shall continue shall be deemed a separate and distinct offense."

city to the prosecution of a business. This is not a valid requirement. See *Sault Ste. Marie v. International Transit Company*, 234 U.S. 333, 340, 58 L. ed. 1337, 1340.

As we have seen, the 1955 ordinance eliminated from §28-1 of the prior ordinance a requirement that a terminal vehicle must be operated under contracts with railroad and steamship companies, and, by a new section, §28-31.1, in effect permitted Parmelee's existing terminal vehicle licenses to become perpetual by means of annual renewal or by transfer to a replacement vehicle, and also provided, in effect, that Transfer could not obtain any terminal vehicle license unless it proved to the satisfaction of the public vehicle license commissioner "that public convenience and necessity shall require additional terminal vehicle service".

In *Buck v. Kuykendall*, 267 U.S. 9307, it appears that Buck wished to operate an autostage line as a common carrier for hire for through interstate passengers, over a public highway in the state of Washington. Having complied with the state laws relating to motor vehicles and owners and drivers, and alleging willingness to comply with all applicable regulations concerning common carriers, Buck applied to the state for a prescribed certificate of public convenience and necessity. It was refused on the ground that the territory involved was already being adequately served by the holder of a certificate and that adequate transportation facilities were already being provided by four connecting autostage lines, all of which held such certificates from the state. The state relied upon its statute which prohibited common carriers for hire from using the highways by auto vehicles between fixed termini, or over regular routes, without having first obtained from the state a certificate of public convenience and necessity. Speaking of that statute, the court said, at 315:

"* * * Its primary purpose is not regulation with a view to safety or to conservation of the highways, but

the prohibition of competition. It determines not the manner of use, but the persons by whom the highways may be used. It prohibits such use to some persons while permitting it to others for the same purpose and in the same manner. * * * Thus, the provision of the Washington statute is a regulation, not of the use of its own highways, but of interstate commerce. Its effect upon such commerce is not merely to burden but to obstruct it. Such state action is forbidden by the Commerce Clause. * * *

To the same effect is *Mayor of Vidalia v. McNeely*, 274 U.S. 676, at 683.²⁶

4. We hold that it was unnecessary for Transfer to apply for licenses under the 1955 ordinance, because the issuance thereof unlawfully required a consent by the city to the prosecution of Transfer's business and was not merely a step in the regulation thereof. Being unnecessary, the relief prayed for herein may be granted without a showing that such application had been made before this suit was filed.

For the reasons hereinbefore set forth, the judgment of the district court is reversed and this cause is remanded to that court for further proceedings not inconsistent with the views herein set forth.

REVERSED AND REMANDED.

²⁶ Both sides in the case at bar rely on *Columbia Terminals Co. v. Lambert*, 30 F. Supp. 28, appeal dismissed, 309 U.S. 620. The court there said that the question whether the state could demand that Columbia Terminals prove that its interstate commerce transfer operation would benefit the state, in order to obtain a state permit therefor, was not before it, because the state expressly admitted it lacked such power and made no such demand. The court said, at 31:

"Since this statute applies to interstate as well as intrastate contract haulers, if the complaint alleged or the evidence disclosed such action on the part of the State Commission, plaintiff would be entitled to relief from such action on the part of the state officials. * * * But when the State * * * undertakes to exercise the right to say what interstate commerce will benefit the State and what will not, such action, with certain exceptions immaterial here, constitutes an unconstitutional violation of the commerce clause."

While this is dictum, it is in accord with our holding herein.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1956.

No. ~~1003~~ 104

PARMELEE TRANSPORTATION CO., ET AL.,
Appellants,
vs.

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY CO., ET AL.,
Appellees.

Appeal from the United States Court of Appeals
for the Seventh Circuit

STATEMENT AS TO JURISDICTION.

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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1956.

No.

PARMELEE TRANSPORTATION CO., ET AL.,
Appellants,

vs.

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY CO., ET AL.,
Appellees.

Appeal from the United States Court of Appeals
for the Seventh Circuit

STATEMENT AS TO JURISDICTION.

In compliance with Rules 13 and 15 of this Court, the appellants submit herewith this statement particularly disclosing the basis upon which this Court has jurisdiction on appeal to review the judgment of the United States Court of Appeals for the Seventh Circuit, entered on January 17, 1957, following the denial of petitions for rehearing on February 20, 1957.

Opinions Below.

The opinion of the United States District Court for the Northern District of Illinois, Eastern Division, is reported at 136 F. Supp. 476. The opinion of the United States Court of Appeals for the Seventh Circuit is not yet reported and is attached here as Appendix B, p. 18a-33a, *infra*.

Nature of Proceeding.

This is an action brought by the appellee Railroad Companies and Railroad Transfer Service, Inc. for a declaratory judgment that Chapter 28 of the Municipal Code of Chicago was inapplicable to the transfer service activities carried on by the appellee Railroad Transfer Service, Inc. in Chicago and for an injunction to prevent the officials of the City of Chicago from enforcing the ordinance. The jurisdiction of the United States District Court was invoked under 28 U.S.C. §§ 1331, 1337. The United States District Court held that the ordinance was applicable to the activities of Railroad Transfer Service, Inc. in the City of Chicago and that the ordinance as so applied was constitutional. It granted appellants' motion for summary judgment to that effect. 136 F. Supp. 476. The United States Court of Appeals for the Seventh Circuit held that the ordinance was applicable to the activities of Railroad Transfer Service, Inc. which were carried on in the City of Chicago, but ruled that the ordinance as so applied violated the Commerce Clause of the United States Constitution. Article I, Section 8, Clause 3. See appendix B, *infra*, p. 18a-33a.

Judgments Below.

The judgment of the United States District Court for the Northern District of Illinois was entered on January 12, 1956. The judgment of the United States Court of Appeals for the Seventh Circuit, review of which is sought here, was entered on January 17, 1957. Petitions for rehearing were denied by the latter Court on February 20, 1957.

Statutory Basis for Jurisdiction.

The jurisdiction of this Court to review on appeal the judgment of the Court of Appeals for the Seventh Circuit is conferred by 28 U.S.C. § 1254(2).

Cases Sustaining Jurisdiction.

Cases which sustain the jurisdiction of this Court to entertain the appeal from the judgment of the Court of Appeals for the Seventh Circuit are: *Watson v. Employers Liability Assurance Corp.*, 348 U.S. 66 (1954); *Ott v. Mississippi Valley Barge Co.*, 336 U.S. 169 (1949); *Republic Pictures Corp. v. Kappler*, 327 U.S. 757 (1946); *McCarroll v. Dixie Greyhound Lines, Inc.*, 309 U.S. 176 (1940); *Keating v. Public National Bank*, 284 U.S. 587 (1931); *Richmond v. Deans*, 281 U.S. 704 (1930); *New York v. Latrobe*, 279 U.S. 421 (1929); *Natchez v. Mc-Neeley*, 275 U.S. 502 (1927).

Chapter 28 of the Municipal Code of Chicago.

Section 28-1 through 28-32 of the Municipal Code of the City of Chicago are set forth in Appendix A, *infra*, p. 1a-17a.

Questions Presented.

The following questions are presented by this appeal:

1. Whether the Court of Appeals erred in holding that the City of Chicago could not constitutionally require the appellee Railroad Transfer Service, Inc., a non-certificated motor carrier engaged primarily in interstate commerce wholly within the City of Chicago, to secure a license in order to use the public streets and highways within that city, where the license requirement was a means of effectuating a plan of regulation relating to traffic control, public safety, and maintenance of the streets and highways within the City of Chicago.

2. Whether the Court of Appeals erred in gratuitously anticipating a constitutional question by not requiring the appellee Railroad Transfer Service, Inc. to exhaust its administrative remedies by applying for a license as required by the Municipal Code of the City of Chicago, §§ 28-1 through 28-32.

3. Whether the Court of Appeals erred in imputing improper motives to the City Council of the City of Chicago in order to hold that the ordinance in question was unconstitutional as applied to the appellee Railroad Transfer Service, Inc.

4. Whether the Court of Appeals erred in substituting its judgment for that of the City Council of the City of Chicago with respect to whether the licensing of motor vehicles performing transfer services within the City of Chicago was an appropriate means of effectuating the police power of the City of Chicago, exercised for the purpose of controlling traffic, effecting public safety and maintaining streets and highways within the City of Chicago.

Statement of the Case.

The facts are not in dispute.

In the central business district of Chicago there are eight railroad passenger terminals, each of which is used by one or more of the twenty-one terminal lines serving the city. None of the terminal lines operates through the city. A through passenger (*i.e.*, one whose journey both begins and ends at points other than Chicago) travels on an interline ticket and must change trains at Chicago. When the incoming line and the outgoing line use different terminals, arrangements have been made for the transportation of through passengers and their baggage from one terminal to another. Basically, such transportation constitutes the "terminal services" which are involved in this case, although in a broader sense "terminal services" includes also transfer between railroad terminals and steamship docks, and between terminals or docks and other points in the central business district. Ninety-nine percent of the passengers using these transfer services are traveling in interstate commerce.

The railroads have undertaken to arrange transfer services in Chicago instead of leaving it to the passenger to make his own arrangements for getting from one terminal to another. They have, at least since 1916, published tariffs permitting the inclusion of the transfer service in the fare, and the normal practice is to include in the interline ticket a coupon entitling the passenger to transfer between terminals. In modern times the only practicable means of transfer has been by motor vehicle operating on the streets of Chicago, and the railroads have contracted with motor carriers to provide the service.

For more than a century prior to 1955, transfer services were provided by Parmelee Transportation Company and its predecessors. *Status of Parmelee Transportation Company*, 288 I.C.C. 95 (1953). The vehicles employed have always been regarded as public passenger vehicles for hire, and have been regulated by the City of Chicago under a comprehensive scheme for the regulation of such vehicles. While Parmelee supplied the services it operated in compliance with the regulations prescribed by the City, and the validity of those regulations was not questioned.

It is important to summarize the regulatory situation as it existed in 1955.

Chapter 28 of the Chicago Municipal Code dealt with public passenger vehicles generally, and specifically with livery vehicles, sight-seeing vehicles, taxicabs, and terminal vehicles. A terminal vehicle was defined as "a public passenger vehicle which is operated under contracts with railroad and steamship companies, exclusively for the transfer of passengers from terminal stations." (Section 28-1.) Section 28-2 prohibited the operation of any vehicle for the transportation of passengers for hire on the streets of the city unless it was licensed by the City as a public passenger vehicle.

Section 28-4 provided that no vehicle should be licensed until, after inspection by the public vehicle license commissioner, it had been found to be in safe operating condition and to have adequate body and seating facilities.

Section 28-4.1 conditioned the license on compliance with further specifications for safety, relating to the adequacy of doors and aisle space.

Section 28-5 required the application for a license to be in writing and to give certain information concerning the applicant and the vehicle to be licensed.

Section 28-6 required the commissioner to investigate the "character and reputation of the applicant as a law abiding citizen; the financial ability of the applicant to render safe and comfortable transportation service, to maintain or replace the equipment for such service and to pay all judgments and awards which may be rendered for any cause arising out of the operation" of the vehicle.

Section 28-7 imposed an annual license fee.

Section 28-12 required proprietors of public passenger vehicles to carry public liability and property damage insurance and workmen's compensation insurance, with solvent and responsible insurers approved by the commissioner. The amount of insurance to be carried and certain provisions of the policy were specified. Policies were required to be filed with the commissioner, and provision was made for the filing of an acceptable surety bond in lieu of insurance.

Section 28-13 required the payment of all judgments arising from operation of the vehicle to be paid within 90 days, irrespective of indemnity from insurance.

Section 28-14 provided for suspension of the license if, in the judgment of the commissioner, a vehicle was found unfit for use.

Section 28-15 specified various grounds for license revocation.

Section 28-31 provided:

"No person shall be qualified for a terminal vehicle license unless he has a contract with one or more railroad or steamship companies for the transportation of their passengers from terminal stations.

"It is unlawful to operate a terminal vehicle for the transportation of passengers for hire except for their transfer from terminal stations to destinations in [the central business district]."

Section 28-32 provided fines for the violation of any provision for which another penalty was not specified, and declared that each day of continuance of a violation should be a separate offense.

On June 13, 1955, the railroads notified Parmelee of their decision to terminate its contract for the furnishing of transfer services effective September 30, 1955. The railroads entered into a new contract for the supply of these services with Railroad Transfer Service, Inc., a corporation organized for the purpose.

On July 26, 1955, the City Council amended Chapter 28 of the Municipal Code and effected certain changes in the provisions relating to terminal vehicles. The amendment was in three parts:

(1) The definition of "terminal vehicle" in Section 28-1 was changed so as to eliminate the reference to contracts with railroad and steamship companies.

(2) Section 28-31 was amended to drop the requirement that, to be eligible for a terminal vehicle license, a person must have a contract with one or more railroad or steamship companies.

(3) A new section (28-31.1) was added. Its importance in this action requires that it be set out in full:

"28-31.1. Public Convenience and Necessity. No license for any terminal vehicle shall be issued except in the annual renewal of such license or upon transfer to permit replacement of a vehicle for that licensed unless, after a public hearing held in the same manner as specified for hearings in Section 28-22.1, the commissioner shall report to the council that public convenience and necessity require additional terminal vehicle service and shall recommend the number of such vehicle licenses which may be issued.

"In determining whether public convenience and necessity require additional terminal vehicle service due consideration shall be given to the following:

- "1. The public demand for such service;
- "2. The effect of an increase in the number of such vehicles on the safety of existing vehicular and pedestrian traffic in the area of their operation;
- "3. The effect of an increase in the number of such vehicles upon the ability of the licensee to continue rendering the required service at reasonable fares and charges to provide revenue sufficient to pay for all costs of such service, including fair and equitable wages and compensation for licensee's employees and a fair return on the investment in property devoted to such service;
- "4. Any other facts which the commissioner may deem relevant.

"If the commissioner shall report that public convenience and necessity require additional terminal vehicle service, the council, by ordinance, may fix the maximum number of terminal vehicle licenses to be issued not to exceed the number recommended by the commissioner."

Railroad Transfer Service, Inc. (Transfer) began operations under its contract with the railroads in October, 1955. Transfer never applied for public passenger vehicle licenses as required by Chapter 28 of the Municipal Code. On the contrary, it took the position that the ordinance did not apply to its operations under its contract with the railroads, and that, if the ordinance did apply to such operations, it was void as an attempt to regulate interstate commerce. The City having indicated its intention to enforce the ordinance against Transfer, the railroads and Transfer on October 24, 1955, filed their complaint against the City and its officials in the United States District Court for the Northern District of Illinois, seeking an injunction and a declaration that the ordinance was inapplicable or, in the alternative, that the ordinance was void as applied to the plaintiffs. Jurisdiction was invoked under Section 1331 of the Judicial Code, the requisite jurisdictional amount being in controversy, and under Section 1337.

On November 10, 1955, the district court entered an order permitting Parmelee to intervene as a defendant under the provisions of Rule 24 (b), Federal Rules of Civil Procedure.

On November 17, 1955, the City moved for summary judgment and on January 12, 1956, the court, finding no genuine issue of fact involved, entered its order of summary judgment in favor of the defendants and dismissed the action. The court had filed a memorandum opinion on December 12, 1955. On January 12, 1956, concurrently with its judgment order, the court filed a supplemental memorandum together with findings of fact and conclusions of law. The court held that the ordinance was applicable to Transfer, and that it was a proper exercise of police power by the City in the interest of public safety, health and welfare.

On January 13, 1956, the plaintiffs gave notice of appeal. On January 17, 1957, the United States Court of Appeals for the Seventh Circuit filed its opinion and order reversing the judgment of the district court and remanding the cause for further proceedings. The decision of the Court of Appeals was rested squarely on the invalidity of the ordinance under the Federal Constitution and laws.

On February 20, 1957, the Court of Appeals denied petitions for rehearing filed by the City and Parmelee, respectively.

The Questions Presented Are Substantial.

I.

The Court of Appeals has stricken down the City's plan for regulating terminal vehicles in the interest of public safety and welfare, leaving this important branch of the public transportation of passengers for hire within the City unregulated by any governmental agency. In so doing, the Court of Appeals has decided an important constitutional question in a way in conflict with applicable decisions of this Court.

Essentially, the Court of Appeals' decision is based on the proposition that no state authority may require a license as a condition of the right to carry on an interstate business. This Court has repeatedly held otherwise:

“Our precise position must be made clear at the outset. Throughout the course of this litigation the City and Parmelee have consistently urged upon the courts a modest but clear conception of the City's power to regulate the transfer services involved, expressly conceding the established limitations on that power. To quote from their brief in the Court of Appeals (pp. 10, 11):

“1. We *concede* that the city may not withhold a license to carry on interstate transfer operations solely or even primarily on the ground that existing

facilities are adequate, or that additional operations will adversely affect the competitive situation, or other such 'economic' grounds. *Buck v. Kuykendall*, 267 U. S. 307 (1925).

"2. We *concede* that the city may not, even in the enforcement of its lawful police regulations, withdraw the privilege of carrying on interstate transportation from a motor carrier holding a certificate of convenience and necessity issued by the Interstate Commerce Commission. *Castle v. Hayes Freight Lines, Inc.*, 348 U. S. 61 (1954)."

Railroad Transfer Service, Inc., does not hold a certificate of convenience and necessity from the Interstate Commerce Commission, and cannot obtain one. Its operations are not within the coverage of Part II of the Interstate Commerce Act, which regulates motor carriers. *Status of Parmelee Transportation Co.*, 288 I.C.C. 95, 104 (1953). While, therefore, the City may not condition Transfer's right to carry on its interstate operations upon a determination by the City that such operations are necessary and in the public interest in economic terms, the City has the right to impose reasonable regulations in the interest of public safety and welfare, and in the interest of conserving the public streets, and to require a license in aid of such a regulatory plan. The decisions of this Court so hold. The Court of Appeals ignored the distinctions which were so carefully made, and relied upon the inapposite decisions in *Buck v. Kuykendall* and *Castle v. Hayes Freight Lines, Inc.* to support its decision.

This Court's most recent decision in point is *Fry Roofing Co. v. Wood*, 344 U. S. 157 (1952). A Tennessee manufacturer was transporting his goods to Arkansas by truck under an arrangement which was found to make the owner-drivers of the trucks contract carriers. The truckers had no permit or certificate from either the state or the Inter-

state Commerce Commission. Arkansas law required such carriers to obtain a permit, or "Certificate of Necessity and Convenience." The truckers sued to enjoin enforcement of the requirement, and the Arkansas Supreme Court dismissed the action. This Court affirmed. Four members of the Court, reading the statute as a regulation of interstate commerce indistinguishable from the Washington statute which was invalidated in *Buck v. Kuykendall*, dissented. The majority, however, accepting the interpretation placed upon the statute by state authorities, upheld the right of the state by requiring a "permit," to require registration in order that the state might properly apply its valid police, welfare, and safety regulations to motor carriers using its highways.

Concededly, the Chicago ordinance here in question involves more than a mere requirement of registration. It includes a registration requirement, and in other ways employs the licensing device in aid of valid regulations designed to promote public safety and welfare. As construed by the City and the District Court, it does not reserve to the City or its officials any discretionary power to deny a license on grounds such as those which were proscribed in *Buck v. Kuykendall*. The fact that the permit in the *Fry* case served only to insure a registration is not the significant factor in that case. What is significant is that the Court, following its previous decisions, there reaffirmed the power of the state to employ licensing as a sanction in aid of valid police regulations as applied to non-certificated carriers.

More significant than the holding of the *Fry* case itself is its reaffirmation of this Court's decision in *Columbia Terminals Co. v. Lambert*, 30 F. Supp. 28 (1939), decided by this Court on appeal 309 U.S. 620 (1940). This case is absolutely indistinguishable from the case at bar, and unequi-

vocally sustains the power of the state to employ licensing in aid of valid police regulation of noncertificated carriers.

A number of railroads having their eastern termini in St. Louis, Missouri, contracted with Columbia Terminals for the transportation of incoming through freight by motor truck across the Mississippi River to East St. Louis, Illinois. The freight was then carried to its destination by roads having their western termini at that point. Columbia was thus engaged in terminal transfer operations in all material respects identical with the operations of Transfer in this case. Its operations constituted a link in the chain of interstate commerce as clearly as do those of Transfer in this case. A Missouri statute required motor carriers to obtain a permit, to carry insurance, and to observe certain safety regulations. Columbia did not apply for a state permit. It did apply for a federal permit, but the Interstate Commerce Commission held, as it has held with respect to the transfer operations in this case, that the service was not subject to federal regulation under the Motor Carrier Act. When the state took steps to enforce the licensing requirement, Columbia sued for an injunction in a three-judge court. In a careful opinion, reviewing the pertinent decisions of this Court, the district court recognized that, under *Buck v. Kuykendall* and similar cases, the commerce clause is violated when a state "undertakes to exercise the right to say what interstate commerce will benefit the State and what will not." (30 F. Supp. at 32.) It held, however, that reasonable police regulations are not an unlawful burden upon interstate commerce and are justified so long as Congress has not occupied the field. (30 F. Supp. at 31.) So holding, the district court dismissed the bill for want of jurisdiction, because of the absence of a substantial federal question.

While the case was disposed of *Per Curiam* in this Court, it is apparent that the Court's disposition was a carefully considered one. The Court's order was: "The decree is vacated and the cause is remanded to the District Court with directions to dismiss on the merits." (309 U. S. 620.) In other words, the Court, while regarding the contentions made by Columbia as sufficiently substantial to support the jurisdiction of a three-judge court, unanimously agreed that the district court had rightly rejected those contentions on the merits, and had rightly upheld the validity of the state regulatory law.

The holding in *Columbia Terminals* was again approved in the *Fry* case, which contains this Court's authoritative construction of that holding. The majority in the *Fry* case said:

"In *Columbia Terminals Co. v. Lambert*, 30 F. Supp. 28, the District Court upheld a Missouri statute reading: 'It is hereby declared unlawful for any motor carriers . . . to use any of the public highways of this state for the transportation of persons or property, or both, in interstate commerce without first having obtained from the commission a permit so to do. . . .' *Buck v. Kuykendall*, 267 U. S. 307, was held not to require the statutes' invalidation, since Missouri had not refused to grant a permit on the ground that the state had power to say what interstate commerce would benefit the state and what would not. Agreeing with this constitutional holding, we ordered the complaint dismissed." (344 U. S. 157, 162, note 5.)

The minority in the *Fry* case also referred to *Columbia Terminals*:

"*Columbia Terminals Co. v. Lambert*, 30 F. Supp. 28, whose ruling we sustained, 309 U. S. 620, is not in point. The Interstate Commerce Commission had ruled in that case that the particular operations there involved were not covered by the Federal Act. See 30 F. Supp., at 30." (344 U. S. 157, 166, note 3.)

Thus, while four members of the Court were of opinion that the doctrine of *Columbia Terminals* did not apply to a noncertificated carrier subject to the Motor Carrier Act, all members of the Court reaffirmed the doctrine of that case and its application to carriers *not subject* to the act. We reiterate that the Interstate Commerce Commission has held that the terminal transfer services engaged in by Transfer are not subject to regulation under Part II of the Interstate Commerce Act, covering motor carriers, just as it held that Columbia's terminal transfer services were not subject to regulation under the Motor Carrier Act.

The teaching of the cases is clear. No state or city can withhold a permit to engage in interstate motor transportation on the ground that the state has power to say what interstate commerce will benefit the state and what will not—i.e., to deny a permit on "economic" grounds. But where a carrier does not hold a certificate from the Interstate Commerce Commission—or, at least, where the carrier is not subject to regulation as a motor carrier by the Commission—a state can employ licensing as a sanction for valid regulatory measures designed for the promotion of public safety and welfare.

The decision of the Court of Appeals is also in conflict with the following cases, which are to the same effect:

(1) *Eichholz v. Public Service Comm'n*, 306 U. S. 268 (1939) (upholding the power of Missouri to revoke a state permit to engage in interstate motor carrier operations where the carrier had violated state laws relating to intra-state operations; the carrier had applied for a certificate from the Interstate Commerce Commission, but the Commission had not acted on the application. The case is cited with approval in the *Fry* case, 344 U.S. at 162, note 5.)

(2) *H. P. Welch Co. v. New Hampshire*, 306 U.S. 79 (1939) (upholding the power of New Hampshire to suspend

the state "registration certificate" of an interstate motor carrier for violation of state law relating to hours of service for drivers. The violations occurred after the enactment of the Federal Motor Carrier Act, but before the effective date of regulations covering hours of service promulgated by the Interstate Commerce Commission. The principle, applicable to the instant case, is that, in the absence of applicable federal regulation, a state may employ licensing as a sanction for regulations designed to promote the public safety and welfare. The case is cited with approval in *Fry*, 344 U.S. at 162, note 5.)

(3) *McDonald v. Thompson*, 305 U.S. 263 (1938) (upholding the power of Texas to withhold a certificate from an interstate carrier on the ground that the proposed operations would subject the highways involved to excessive burden and would endanger and interfere with ordinary use by the public. The carrier was subject to, but had no certificate under, the Federal Motor Carrier Act. The Court also held that the carrier's interstate operations without the certificate required by Texas law did not qualify it as having been "in bona fide operation as a common carrier" under the "grandfather" clause of the Motor Carrier Act. The case is cited with approval in *Fry*, 344 U.S. at 162, note 5.)

(4) *Buck v. California*, 343 U.S. 99 (1952) (upholding the power of San Diego county to require a permit for taxicab operations in foreign commerce, as a sanction for standards relating to the service and public safety. Taxicabs, like terminal vehicles, are excluded from the coverage of Part II of the Interstate Commerce Act with exceptions not here material.)

The same principle was established prior to the enactment of the Federal Motor Carrier Act, and the cases so holding are still in point since that Act does not cover

the operations in question here: *Clark v. Poor*, 274 U.S. 554 (1927); *Hicklin v. Coney*, 290 U.S. 169 (1933); *Bradley v. Public Utilities Comm'n of Ohio*, 289 U.S. 92 (1933); *Continental Baking Co. v. Woodring*, 286 U.S. 352 (1932); and see *Texport Carrier Corp. v. Smith*, 8 F. Supp. 28 (D. C. S. D. Tex., 1934).

These principles were not affected by the decision of this Court in *Castle v. Hayes Freight Lines, Inc.*, 348 U.S. 61 (1954). That case held that a state could not *suspend* the privilege of a certificated interstate carrier to do business, and it implied that a state could not in the first instance withhold from such a carrier the privilege of doing interstate business, even as a sanction for the violation of valid police regulations. It is abundantly clear from a reading of the Court's opinion, however, that the principle is limited to carriers holding certificates of convenience and necessity from a federal agency, and has no application to carriers not holding such certificates and not eligible for them.

II.

A matter of sheer logomachy has introduced confusion and error into the decision of the Court of Appeals, and should be clarified here once and for all. The Chicago ordinance here in question, in requiring licenses for terminal vehicles, speaks of a finding by the commissioner that public convenience and necessity require the service; and among the factors to which the commissioner is required to give "due consideration" is "The effect of an increase in the number of such vehicles upon the ability of the licensee to continue rendering the required service at reasonable fares and charges to provide revenue sufficient to pay for all costs of such service, including fair and equitable wages and compensation for licensee's employees and a fair return on the investment in property devoted to such service." (Municipal Code of Chicago,

Section 28-31.1. *Infra* p. 16a-17a) Read superficially, this language appears to authorize the commissioner to exercise a discretion on the basis of economic considerations, such as were proscribed by *Buck v. Kuykendall*. As this Court has often recognized, however, regulatory measures of this kind are commonly drawn for application to both intrastate and interstate operations; the term "public convenience and necessity" does not necessarily import the exercise of discretion on the basis of "economic" considerations; the validity of the regulation will be upheld so long as inappropriate provisions are not applied to interstate operations; and the courts will accept as authoritative the construction placed on the regulation by appropriate state officials, disclaiming power or intention to give the regulation unconstitutional application. In rejecting the interpretation placed on the ordinance by the City and its officials; and in presuming that the ordinance would be unconstitutionally applied, the Court of Appeals decided a federal question in a way in conflict with applicable decisions of this Court.

In the cases which have been cited, upholding state power to license interstate motor carriers in the interest of public safety and welfare and highway conservation, the statutory requirement normally was that the carrier obtain a certificate of public convenience and necessity. This was so in *Clark v. Poor*, 274 U.S. 554 (1927) (see Ohio Gen. Code, Section 614-87 (1929)); *Hicklin v. Coney*, 290 U.S. 169 (1933) (see S.C. Code 1932, Section 8510); *Bradley v. Public Utilities Comm'n of Ohio*, 289 U.S. 92 (1933); *Eichholz v. Public Utilities Comm'n of Missouri*, 306 U.S. 268 (1939); and *McDonald v. Thompson*, 305 U.S. 263 (1938). Sometimes, as in *Columbia Terminals Co. v. Lambert*, 30 F. Supp. 28 (E.D. Mo. 1939), *Buck v. California*, 343 U.S. 99 (1952), and *Fry Roofing Co. v. Wood*, 344 U.S. 157 (1952), the authority to operate has been designated

a "permit"; but that has not been a distinguishing factor. Typically, as in the *Columbia Terminals* case, the statute has also contained language specifying "economic" factors to be taken into consideration by the licensing official—language inappropriate to the exercise of the licensing power with respect to interstate carriers. But this Court has never decided the cases on merely literal grounds. This Court has never doubted that a "certificate of public convenience and necessity" may appropriately be withheld on grounds relating to the valid exercise of the police power, and has invalidated statutes requiring such certificates only when the carrier has been able to show, as in *Buck v. Kuykendall*, that the license has been denied on improper grounds.

(See also *Ex parte Truelock*, 139 Tex. Crim. Rep. 365, 140 S.W. 2d 167, 169 (1940); *Cannon Ball Transportation Co. v. Public Utilities Comm'n of Ohio*, 113 Ohio St. 565, 149 N.E. 713 (1925); *Wald Storage and Transfer Co. v. Smith*, 4 F. Supp. 61 (S.D. Tex., three-judge court 1933) aff'd 290 U.S. 596 (1933).)

In the Court of Appeals, the *Columbia Terminals* case—a powerful precedent, on all fours with the case at bar—was disposed of in a footnote (note 26) on the ground that, while the licensing statute spoke in terms of a finding of public benefit (i.e., of economic considerations), the state had expressly admitted that it lacked such power and made no such demand. But in this respect the cases are identical. In Appellees' Brief in the Court of Appeals, signed by John C. Menaphy, Corporation Counsel and chief legal officer of the City of Chicago, representing the City, the Mayor, the Public License Commissioner, and the Commissioner of Police, there appears the following clear statement (at page 36):

"We concede that the city may not withhold a license to carry on interstate transfer operations solely or

even primarily on the ground that existing facilities are adequate, or that additional operations will adversely affect the competitive situation, or other such 'economic' grounds, *Buck v. Kuykendall*, 267 U.S. 307 (1925)."

In Part III of the same brief (pages 51-58) the appellees in the Court of Appeals, including the City and all appropriate officials thereof, urged that the proper construction of the ordinance was the one adopted by Judge LaBuy in the District Court, viz., that the ordinance did not authorize the withholding of a license on economic grounds, but only on considerations relating to public safety, traffic, and the conservation and maintenance of streets. Precisely as in *Columbia Terminals*, the City disclaims any and every authority or intention to give to the ordinance in question an unconstitutional application. It follows that the full force of the reasoning in *Columbia Terminals* is applicable to this case:

"The mere susceptibility of a statute to a construction which could render it unconstitutional does not afford sufficient ground for injunctive relief where, as here, it does not appear that the statute has ever been so construed, where the enforcing authorities affirm a recognition of its unconstitutionality if so construed and disclaim any intention of doing so, and where plaintiff's real ground for relief is not the application of the Statute to it." (30 F. Supp. at 32.)

Clark v. Poor, 274 U.S. 554 (1927), is also squarely in point. The Ohio statute required a certificate of public convenience and necessity. Without applying for a certificate, the carrier, engaged exclusively in interstate commerce, sought an injunction. A three-judge court dismissed the bill, and this Court affirmed, saying (at 556):

"It appeared that while the Act calls the certificate one of 'public convenience and necessity,' the Commis-

sion had recognized, before this suit was begun, that, under *Buck v. Kuykendall*, 267 U.S. 307 and *Bush v. Maloy*, 267 U.S. 317, it had no discretion where the carrier was engaged exclusively in interstate commerce, and was willing to grant to plaintiffs a certificate upon application and compliance with other provisions of the law."

The plaintiffs in that case also contended that the decree should be reversed because the statute provided that no certificate should issue until the carrier filed cargo insurance policies. This Court said:

"The lower court held that, under *Michigan Public Utilities Commission v. Duke*, 266 U.S. 570, this provision could not be applied to exclusively interstate carriers . . .; and counsel for the Commission stated in this Court that the requirements for insurance would not be insisted upon. Plaintiffs urge that because this was not conceded at the outset, it was error to deny the injunction. The circumstances were such that it was clearly within the discretion of the court to decline to issue an injunction . . ." (274 U.S. at 557-58.) (Emphasis ours)

In refusing to accept the construction placed upon the ordinance by responsible city officials, and in disregarding the canon that legislation is to be construed if possible to avoid constitutional questions, the Court of Appeals departed from salutary principles established by the decisions of this Court. See *Phyle v. Duffy*, 334 U.S. 431, 441 (1948); *Gerendé v. Board of Supervisors of Elections of Baltimore City*, 341 U.S. 56, 57 (1951); *Fox v. Washington*, 236 U.S. 273 (1915); *Alabama State Federation of Labor v. McAdary*, 325 U.S. 450, 470 (1945).

III.

In gratuitously anticipating constitutional questions, and in not requiring the plaintiffs to exhaust their administrative remedies, the Court of Appeals decided a constitutional question in a way in conflict with applicable decisions of this Court.

Since the City clearly has power, under the cases cited, to require a license as a means of enforcing valid regulations designed to promote public safety and welfare, the invalidation of the ordinance must rest upon apprehension that the ordinance will be unconstitutionally applied, despite the responsible assurances given by counsel that there is no such intention. Indeed, the opinion of the Court of Appeals appears to adopt the charge made by counsel for the railroads, that "as a purported safety measure, [the ordinance] is sham and spurious (p. 29a, *infra*); and that Court itself charges without qualification that the ordinance is an attempt to give Parmelee a monopoly of terminal vehicle licenses, "rather than an exercise of the city's police power over traffic." (p. 30a, *infra*.)

These are serious charges for any court to make against any legislative body. It is particularly regrettable that a United States court should make such charges against a city council, where the city and all its responsible officials have assured the court that they construe the ordinance otherwise, and, where the parties invoking the jurisdiction of the court have failed and refused to apply for licenses. Not having applied for a license, Transfer is in the position of obdurately refusing the city's assurance that the ordinance will be applied constitutionally and in good faith, and of charging irresponsibly that the city will, "in the guise of an exercise of its police power, . . . cripple interstate commerce." (p. 29a, *infra*.) Throughout this litigation, the attack on the ordinance has been a com-

pound of speculation and conjecture. The argument has been that if Transfer were to apply for a license (which it has no intention of doing), the commissioner would deny the application, and that the evidence (which has not been introduced) in the record (which has not been made) before the commissioner could not support the action (which has not been taken) if it purported to rest on considerations of public safety and welfare as distinguished from prohibited economic considerations. The validity of the ordinance and the good faith of the city cannot be impugned in such a way.

We need not dwell on cases establishing the general principle that requires exhaustion of administrative remedies (*Myers v. Bethlehem Shipbuilding Corp.*, 303 U.S. 41 (1938); *Aircraft and Diesel Equipment Corp. v. Hirsch*, 331 U.S. 752 (1947); the exact question as it is presented in this case has been decided by this Court. The situation here is identical with that in *Columbia Terminals Co. v. Lambert*, 30 F. Supp. 28, aff'd 309 U.S. 620 (1940). There the district court said:

"One who is within the terms of a statute, valid upon its face, that requires a license or certificate as a condition precedent to carrying on business may not complain because of his anticipation of improper or invalid action in administration [cited cases omitted]. The plaintiff has neglected to make application for a permit covering its operations. . . . Until it does so, it is not in position to invoke the injunctive powers of this Court to restrain the enforcement of the State laws. 'The long-settled rule of judicial administration [is] that no one is entitled to judicial relief . . . until the prescribed administrative remedy has been exhausted.' " (30 F. Supp. at 33-34.)

Among the cases which have been cited herein, not one has held unconstitutional a state statute or municipal ordinance requiring a license for interstate motor carrier op-

erations in the absence of an application for a license and a denial on unconstitutional grounds. The cases holding licensing laws invalid are all cases in which the carrier followed the appropriate procedure, pursued his administrative remedies, applied for a license, made a record suitable for judicial review, and presented the reviewing court with evidence that the license had been denied or withdrawn on unconstitutional grounds. Where the carrier has sought relief by injunction or otherwise without pursuing his administrative remedies, relief has been denied.

In *Buck v. Kuykendall*, 267 U.S. 307 (1925), where the Court held the licensing requirement invalid, it acted on the basis of a record showing the denial of a license and the grounds for denial. The same is true of *Bush v. Maloy*, 267 U.S. 317 (1925).

On the other hand, in *Continental Baking Co. v. Woodring*, 286 U.S. 352 (1932), where the carrier sought an injunction without applying for a license, relief was denied. In *Hicklin v. Coney*, 290 U.S. 169 (1933), where the carrier, without applying for a license, resisted an enforcement proceeding on the ground of invalidity, the defense failed. In *McDonald v. Thompson*, 305 U.S. 263 (1938), where the carrier sought an injunction without applying for a license, relief was denied. In *Buck v. California*, 343 U.S. 99 (1952), the defendants asserted the invalidity of the statute as a defense to an enforcement proceeding. While they had made oral applications for licenses, the ordinance required written applications, and the record failed to show the grounds for denial. The situation was equivalent to one in which no application had been made, and the defense failed. In *Fry Roofing Co. v. Wood*, 344 U.S. 157 (1952), the carrier sought an injunction without applying for a license, and relief was denied. Similarly, in *State v. Nagle*, 148 Me. 197, 91 A.2d 397 (1952), the carrier, with-

out applying for a license, asserted the invalidity of the ordinance as a defense to an enforcement proceeding. The defense failed, the court saying:

“Even though the issue of the permit is mandatory provided the condition of the highways to be used is such that it would be safe for the operation proposed, and the safety of other users of the highways would not be endangered thereby, the Public Utilities Commission under the statute here in question has not only the duty but the power and authority to determine these questions as questions of fact.” (148 Me. 197, 207-8, 91 A.2d 397, 402.).

To the same effect are *Lehon v. Atlanta*, 242 U.S. 53, 55-56 (1919); *Hall v. Geiger-Jones Co.*, 242 U.S. 539, 553-54 (1917); *Gundling v. Chicago*, 177 U.S. 183, 186 (1900).

The point is made with great clarity in *Clark v. Poor*, 274 U.S. 554 (1927). There the carrier, ignoring the provisions of the statute, operated without applying for a certificate, and sought injunctive relief against enforcement. There, as here and as in *Fry and Columbia Terminals*, the licensing laws read in terms of economic factors as well as of valid police regulation, but the local authorities had disclaimed any authority or intention to withhold a license on grounds proscribed by *Buck v. Kyjkendall*. Relief was denied. “The plaintiffs did not apply for a certificate or offer to pay the taxes. They refused or failed to do so, not because insurance was demanded, but because of their belief that, being engaged exclusively in interstate commerce, they could not be required to apply for a certificate or to pay the tax. Their claim was unfounded.” This Court’s disposition of that appeal furnishes, we submit, the model for the disposition of the appeal in this case:

“The decree dismissing the bill is affirmed, but without prejudice to the right of the plaintiffs to seek

appropriate relief by another suit if they should hereafter be required by the Commission to comply with conditions or provisions not warranted by law." (274 U.S. at 558.)

IV.

On the basis of certain records of the City Council and its committee on local transportation, the Court of Appeals attributed to the City Council improper motives in the enactment of the amendment of 1955, and on the basis of such supposed motives held invalid an ordinance otherwise valid. In so doing the Court of Appeals decided a federal question in a way in conflict with applicable decisions of this Court.

This Court has reiterated, time and again, that it is not the function of the federal courts to question the motives of legislatures. Only recently, speaking for the Court, Mr. Justice Frankfurter said:

“The holding of this Court in *Fletcher v. Peck*, 6 Cranch 87, 130, that it was not consonant with our scheme of government, for a court to inquire into the motives of legislators, has remained unquestioned. See cases cited in *Arizona v. California*, 283 U.S. 423, 455.” *Tenney v. Brandhove*, 341 U.S. 367, 377 (1951).

That this doctrine refers not only to the motives of federal legislators, which were involved in the *Brandhove* case, but to legislators of the states as well, is apparent not only from the reference to *Fletcher v. Peck*, but from the specific statement in *Arizona v. California*: “Similarly, no inquiry may be made concerning the motives or wisdom of a state legislature acting within its proper powers.” 283 U.S. at 455, n. 7. Or to use Mr. Justice Holmes’ language, in a case which, like this one, involved an attack on a legislature’s amendment of its own legislation: “. . . we do not inquire into the knowledge, negligence, methods or

motives of the legislature if, as in this case, the repeal was passed in due form." *Calder v. Michigan ex rel. Ellis*, 218 U.S. 591, 598 (1910).

Of the long series of cases substantiating the proposition that the Court of Appeals erred in looking beyond the legislation to the motives of the legislators, two more are of particular interest. In *Daniel v. Family Security Life Ins. Co.*, 336 U.S. 220. (1949), the contention was that the legislation in issue had been secured by competitors of the plaintiff in order to maintain their own preferred position rather than to abate evils which the state had the right to abate. The Court there sustained the regulation and stated:

"It is said that the 'insurance lobby' obtained this statute from the South Carolina legislature. But a judiciary must judge by results, not by the varied factors which may have determined legislators' votes. We cannot undertake a search for motive in testing constitutionality." (336 U.S. at 224.)

In *Railway Express Agency, Inc. v. New York*, 336 U.S. 106 (1949), an attack was made on a police regulation which forbade trucks to carry advertising on their sides unless the advertising was on behalf of the owner and operator of the trucks. The challenge was made, in part on the grounds of the Commerce Clause, that such a regulation could not possibly have anything to do with the exercise of the police power. In the course of its opinion the Court said:

"We would be trespassing on one of the most intensely local and specialized of all municipal problems if we held that this regulation had no relation to the traffic problem of New York City. It is the judgment of the local authorities that it does have such a relation. And nothing has been advanced which shows that to be palpably false." (336 U.S. at 109.)

"The local authorities may well have concluded that those who advertise their own wares on their trucks do not present the same traffic problem in view of the nature or extent of the advertising which they use. It would take a degree of omniscience which we lack to say that such is not the case. If that judgment is correct, the advertising displays that are exempt have less incidence on traffic than those of appellants." (336 U.S. at 110.)

"It is finally contended that the regulation is a burden on interstate commerce in violation of Art. I, § 8 of the Constitution. Many of these trucks are engaged in delivering goods in interstate commerce from New Jersey to New York. *Where traffic control and the use of highways are involved and where there is no conflicting federal regulation, great leeway is allowed local authorities, even though the local regulation materially interferes with interstate commerce. The case in that posture is controlled by South Carolina State Highway, Dept. v. Barnwell Bros.*, 303 U. S. 177." (336 U.S. at 111, emphasis added.)

See also *Breard v. Alexandria*, 341 U.S. 622, 639 (1951).

That Illinois law requires the same result is made abundantly clear by the long line of authorities cited in Judge LaBuy's opinion in the District Court. See 136 F. Supp. 476, at 483.

Furthermore, the Court of Appeals has misconceived and misconstrued the legislative history and purpose involved in the 1955 amendment. To the extent that this history has any pertinence, it reveals clearly that the City did not seek to grant an exclusive right to Parmelee or any other company, but that the City exercised its right to control the commercial use of its streets by terminal vehicles; sought to permit Parmelee to continue operating commercially over city streets without the necessity of a

contract with the railroads, and permitted additional licenses to be issued upon appropriate showing. Having broadened the scope of what constitutes terminal vehicles, the City set up a reasonable system for regulating the issuance of additional licenses. This is in line with action taken by the City Council in other similar situations involving the City's licensing powers.

In short, the Court of Appeals erroneously sought to determine the motive of the City Council in amending the ordinance; speculated erroneously on the nature of that motive, attributing illegal and improper motives to the City Council; and, disregarding the responsible assurances and commitments made to the court by the city's chief legal officer, struck down a valid ordinance on the basis of an unwarranted and presumptuous conviction that the ordinance, as a police measure, was "sham and spurious." In so doing, the court exceeded its judicial powers.

V.

In taking the position that no governmental control over the number of terminal vehicles in operation was necessary in order to avoid traffic congestion, protect the safety of the public, and preserve the streets of the city, and that the license requirement was not a necessary sanction for the implementation of the city's legitimate police powers, the Court of Appeals assumed to substitute its judgment for that of the Council on a matter clearly within the legislative discretion; and therefore decided a federal question in a way in conflict with applicable decisions of this Court.

At page 11 of its opinion the Court of Appeals says:

"To us it appears that the cost of maintaining the terminal vehicle service, which is initially borne by Transfer and ultimately, to the extent of coupons is-

sued and used, by the individual Terminal Lines, will operate effectively as an economic brake upon any unjustified increase in the number of such vehicles." (Appendix page 29a)

This is tantamount to a determination that regulation of the number of terminal vehicles in operation is unnecessary for protection of the public safety and for conservation of the streets. Such a determination calls for the exercise of legislative judgment. Regulation of the use of the streets is committed to the City Council, which has determined that regulation of such vehicles is necessary in the public interest. Moreover, the Court's statement overlooks those aspects of the ordinance which regulate aspects of the terminal vehicle business other than the mere number of vehicles employed.

At page 13 of its opinion the Court of Appeals says:

"If Transfer's vehicles do not conform to the requirements contained in the prior [sic] ordinance, the city may refuse to issue licenses for the nonconforming vehicles and penalize their unlicensed operation in accordance with § 28-32. So, also, whenever Transfer is found guilty of violating § 28-17 *the city may proceed against it according to the penalties section.*" (Emphasis supplied. Appendix page 31a).

Passing the point, which becomes clear on even a cursory reading of the ordinance, that licensing is in many respects the only effective implementation for the city's plan for regulating public passenger vehicles, it is abundantly clear that the court exceeded its judicial authority in passing judgment on the need for the license as a sanction. If, as we submit, the City has power to use the licensing sanction in furtherance of its legitimate police powers, it was not competent for the Court of Appeals to determine that that sanction is not to be employed because

direct remedies by way of fines for violations of the safety provisions of the ordinance are adequate. The choice of available sanctions to implement a regulatory scheme is surely a matter for legislative discretion alone. *Robinson v. United States*, 324 U. S. 282, 286 (1945); *Building Service Employers International Union, Local 262 v. Gazzam*, 339 U.S. 532, 540 (1950); *Watson v. Buck*, 313 U.S. 387, 403 (1941).

ALTERNATE PETITION FOR CERTIORARI

Appellant herein and the City of Chicago are also petitioning for certiorari with respect to the same judgment. We believe that the Supreme Court of the United States has jurisdiction over this appeal. If we are mistaken in this, however, it is requested that the writ of certiorari be issued. *Watson v. Employers Liability Assurance Corp.*, 348 U.S. 66 (1954); *Bradford Electric Light Co. v. Clapper*, 284 U.S. 221 (1931).

Respectfully submitted,

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April, 1957.

APPENDIX A.

MUNICIPAL CODE OF CHICAGO CHAPTER 28

PUBLIC PASSENGER VEHICLES

- 28- 1. Definitions
- 28- 2. License required
- 28- 3. Interurban operations
- 28- 4. Inspections
- 28- 4.1. Specifications
- 28- 5. Application
- 28- 6. Investigation and issuance of license
- 28- 7. License fees
- 28- 8. Renewal of licenses
- 28- 9. Personal license—fair employment practice
- 28-10. Emblem
- 28-11. License card
- 28-12. Insurance
- 28-13. Payment of judgments and awards
- 28-14. Suspension of license
- 28-15. Revocation of license
- 28-16. Interference with commissioner's duties
- 28-17. Front seat passenger
- 28-18. Notice
- 28-19. Livery vehicles
- 28-19.1. Taximeter prohibited
- 28-19.2. Solicitation of passengers prohibited
- 28-20. Livery advertising
- 28-21. Sightseeing vehicles
- 28-22. Taxicabs
- 28-22.1. Public convenience and necessity
- 28-23. Identification of taxicab and cabman
- 28-24. Taximeters

- 28-25. Taximeter inspection
- 28-26. Tampering with meters
- 28-27. Taximeter inspection fee
- 28-28. Taxicab service
- 28-29. Group riding
- 28-29.1. Front seat passenger
- 28-30. Taxicab fares
- 28-31. Terminal vehicle
- 28-32. Penalty

28-1. As used in this chapter:

"Busman" means a person engaged in business as proprietor of one or more sightseeing buses.

"Cabman" means a person engaged in business as proprietor of one or more taxicabs or livery vehicles.

"Chauffeur" means the driver of a public passenger vehicle licensed by the city of Chicago as a public chauffeur.

"City" means the city of Chicago.

"Coachman" means a person engaged in business as proprietor of one or more terminal vehicles.

"Commissioner" means the public vehicle license commissioner, or any other body or officer having supervision of public passenger vehicle operations in the city.

"Council" means the city council of the city of Chicago.

"Livery vehicle" means a public passenger vehicle for hire only at a charge or fare for each passenger per trip or for each vehicle per trip fixed by agreement in advance.

"Person" means a natural person, firm or corporation in his own capacity and not in a representative capacity, the personal pronoun being applicable to all such persons of any number or gender.

"Public passenger vehicle" means a motor vehicle, as defined in the Motor Vehicle Law of the State of Illinois, which is used for the transportation of passengers for hire, excepting those devoted exclusively for funeral use or in operation of a metropolitan transit authority or public utility under the laws of Illinois.

"Sightseeing vehicle" means a public passenger vehicle for hire principally on sightseeing tours at a charge or fare per passenger for each tour fixed by agreement in advance or for hire otherwise at a charge for each vehicle per trip fixed by agreement in advance.

"Taxicab" means a public passenger vehicle for hire only at lawful rates of fare recorded and indicated by taximeter in operation when the vehicle is in use for transportation of any passenger.

"Taximeter" means any mechanical device which records and indicates a charge or fare measured by distance traveled, waiting time and extra passengers.

"Terminal vehicle" means a public passenger vehicle which is operated exclusively for the transportation of passengers from railroad terminal stations and steamship docks to points within the area defined in Section 28-31.

28-2. It is unlawful for any person other than a metropolitan transit authority or public utility to operate any vehicle, or for any such person who is the owner of any vehicle to permit it to be operated, on any public way for the transportation of passengers for hire from place to place within the corporate limits of the city, except on a funeral trip, unless it is licensed by the city as a public passenger vehicle.

It is unlawful for any person to hold himself out to the public by advertisement or otherwise as a busman, cabman or coachman or as one who provides or furnishes any kind of public passenger vehicle service unless he has one or more public passenger vehicles licensed for the class of service offered; provided that any association or corporation which furnishes call service for transportation may advertise the class of service which may be rendered to its members or subscribers, as provided in this chapter, if it assumes the liability and furnishes the insurance as required by section 28-23.

28-3: Nothing in this chapter shall be construed to prohibit any public passenger vehicle from coming into the city to discharge passengers accepted for transportation outside the city. While such vehicle is in the city no person

shall solicit passengers therefor and no roof light or other special light shall be used to indicate that the vehicle is vacant or subject to hire. A white card bearing the words "Not For Hire" printed in black letters not less than two inches in height shall be displayed on the windshield of the vehicle. Any person in control or possession of such vehicle who violates the provisions of this section shall be subject to arrest and fine of not less than fifty dollars nor more than two hundred dollars for each offense.

28-4. No vehicle shall be licensed as a public passenger vehicle until it has been inspected under the direction of the commissioner and found to be in safe operating condition and to have adequate body and seating facilities which are clean and in good repair for the comfort and convenience of passengers.

28-4.1. No vehicle shall be licensed as a livery vehicle or taxicab unless it has two doors on each side, and no vehicle having seating capacity for more than seven passengers shall be licensed as a public passenger vehicle unless it has at least three doors on each side or fixed aisle space for passage to doors.

28-5. Application for public passenger vehicle licenses shall be made in writing signed and sworn to, by the applicant upon forms provided by the commissioner. The application shall contain the full name and Chicago street address of the applicant, the manufacturer's name, model, length of time in use, horse power and seating capacity of the vehicle applicant will use if a license is issued, and the class of public passenger vehicle license requested. The commissioner shall cause each application to be stamped with the time and date of its receipt. The applicant shall submit a statement of his assets and liabilities with his application.

28-6. Upon receipt of an application for a public passenger vehicle license the commissioner shall cause an investigation to be made of the character and reputation of the applicant as a law abiding citizen; the financial ability of the applicant to render safe and comfortable transportation service, to maintain or replace the equip-

ment for such service and to pay all judgments and awards which may be rendered for any cause arising out of the operation of a public passenger vehicle during the license period. If the commissioner shall find that the applicant is qualified and that the vehicle for which a license is applied for is in safe and proper condition as provided in this chapter, the commissioner shall issue a public passenger vehicle license to the owner of the vehicle for the license period ending on the thirty-first day of December following the date of its issuance, subject to payment of the public passenger vehicle license fee for the current year.

28-7. The annual fee for each public passenger vehicle license of the class herein set forth is as follows:

Livery vehicle	\$ 25.00
Sightseeing vehicle	125.00
Taxicab	40.00
Terminal vehicle	25.00

Said fee shall be paid in advance when the license is issued and shall be applied to the cost of issuing such license, including, without being limited to, the investigations, inspections and supervision necessary therefor, and to the cost of regulating all operations of public passenger vehicles as provided in this chapter.

Nothing in this section shall affect the right of the city to impose or collect a vehicle tax and any occupational tax, as authorized by the laws of the state of Illinois, in addition to the license fee herein provided.

28-8. All licenses for public passenger vehicles issued for the year 1951, which have not been revoked or surrendered prior to the time when such licenses for the year 1952 shall have been issued, may be renewed from year to year, subject to the provisions of this chapter.

28-9. No public passenger vehicle license shall be subject to voluntary assignment or transfer by operation of law, except in the event of the licensee's induction or recall into the armed forces of the United States for active duty or in the event of the licensee's death. In case of death the assignment shall be made by the legal represen-

tatives of his estate. No assignment shall be effective until the assignee shall have filed application for a license and is found to be qualified as provided in sections 28-5 and 28-6. If qualified the license shall be transferred to him by the commissioner, subject to payment of a transfer fee of \$50.00, the assumption by the assignee of all liabilities for loss or damage resulting from any occurrence arising out of or caused by the operation or use of the licensed public passenger vehicle before the effective date of the transfer and the approval by the commissioner of the insurance to be furnished by the busman, cabman or coachman as required by section 28-12.

It is unlawful for any busman, cabman or coachman to lease or loan a licensed public passenger vehicle for operation by any person for transportation of passengers for hire within the city. No person other than a chauffeur, who is either the busman, cabman or coachman or one hired by the busman, cabman or coachman to drive such vehicle as his agent or employee, in the manner prescribed by the busman, cabman or coachman, shall operate such vehicle for the transportation of passengers for hire within the city.

There shall be no discrimination by any busman, cabman or coachman against any person employed or seeking employment as a chauffeur with respect to hire, promotion, tenure, terms, conditions and privileges of employment on account of race, color, religion, national origin or ancestry.

28-10. The commissioner shall deliver with each license a sticker license emblem which shall bear the words "Public Vehicle License" and "Chicago" and the numerals designating the year for which such license is issued, a reproduction of the corporate seal of the city, the names of the mayor and the commissioner and serial number identical with the number of the public vehicle license. The predominant back-ground colors of such sticker license emblems shall be different from the vehicle tax emblem for the same year and shall be changed annually. The busman, cabman or coachman shall affix, or cause to be affixed, said sticker emblem on the inside of the glass part of the windshield of said vehicle.

28-11. In addition to the license and sticker emblem the commissioner shall deliver a license card for each vehicle. Said card shall contain the name of the busman, cabman or coachman, the license of the vehicle and the date of inspection thereof. It shall be signed by the commissioner and shall contain blank spaces upon which entries of the date of every inspection of the vehicle and such other entries as may be required shall be made. It shall be of different color each year. A suitable frame with glass cover shall be provided and affixed on the inside of the vehicle in a conspicuous place and in such manner as may be determined by the commissioner for insertion and removal of the public passenger vehicle license card; and in every livery vehicle and taxicab said frame shall also be provided for insertion and removal of the chauffeur's license card and such other notice as may be required by the provisions of this chapter and the rules of the commissioner. It is unlawful to carry any passenger or his baggage unless the license cards are exposed in the frame as provided in this section.

28-12. Every busman, cabman or coachman shall carry public liability and property damage insurance and workmen's compensation insurance for his employees with solvent and responsible insurers approved by the commissioner, authorized to transact such insurance business in the state of Illinois, and qualified to assume the risk for the amounts hereinafter set forth under the laws of Illinois, to secure payment of any loss or damage resulting from any occurrence arising out of or caused by the operation or use of any of the busman's, cabman's or coachman's public passenger vehicles.

The public liability insurance policy or contract may cover one or more public passenger vehicles, but each vehicle shall be insured for the sum of at least five thousand dollars for property damage and fifty thousand dollars for injuries to or death of any one person and each vehicle having seating capacity for not more than seven adult passengers shall be insured for the sum of at least one hundred thousand dollars for injuries to or death of more than one person in any one accident. Each vehicle having seating capacity for more than seven adult passen-

gers shall be insured for injuries to or death of more than one person in any one accident for at least five thousand dollars more for each such additional passenger capacity. Every insurance policy or contract for such insurance shall provide for the payment and satisfaction of any final judgment rendered against the busman, cabman or coachman and person insured, or any person driving any insured vehicle, and that suit may be brought in any court of competent jurisdiction upon such policy or contract by any person having claims arising from the operation or use of such vehicle. It shall contain a description of each public passenger vehicle insured, manufacturer's name and number, the state license number and the public passenger vehicle license number.

In lieu of an insurance policy or contract a surety bond or bonds with a corporate surety or sureties authorized to do business under the laws of Illinois, may be accepted by the commissioner for all or any part of such insurance, provided that each bond shall be conditioned for the payment and satisfaction of any final judgment in conformity with the provisions of an insurance policy required by this section.

All insurance policies or contracts or surety bonds required by this section, or copies thereof certified by the insurers or sureties, shall be filed with the commissioner and no insurance or bond shall be subject to cancellation except on thirty days' previous notice to the commissioner. If any insurance or bond is cancelled or permitted to lapse for any reason, the commissioner shall suspend the license for the vehicle affected for a period not to exceed thirty days, to permit other insurance or bond to be supplied in compliance with the provisions of this section. If such other insurance or bond is not supplied, within the period of suspension of the license, the mayor shall revoke the license for such vehicle.

28-13. All judgments and awards rendered by any court or commission of competent jurisdiction for loss or damage in the operation or use of any public passenger vehicle shall be paid by the busman, cabman or coachman within ninety days after they shall become final and not stayed

by supersedeas. This obligation is absolute and not contingent upon the collection of any indemnity from insurance.

28-14. If any public passenger vehicle shall become unsafe for operation or if its body or seating facilities shall be so damaged, deteriorated or unclean as to render said vehicle unfit for public use, the license therefor shall be suspended by the commission until the vehicle shall be made safe for operation and its body shall be repaired and painted and its seating facilities shall be reconditioned or replaced as directed by the commissioner. In determining whether any public passenger vehicle is unfit for public use the commissioner shall give consideration to its effect on the health, comfort and convenience of passengers and its public appearance on the streets of the city.

Upon suspension of a license for any cause, under the provisions of this chapter, the license sticker emblem shall be removed by the commissioner from the windshield of the vehicle and an entry of the suspension shall be made on the license card. If the suspension is terminated an entry thereof shall be made on the license card by the commissioner and a duplicate license sticker shall be furnished by the commissioner for a fee of one dollar. The commissioner shall notify the department of police of every suspension and termination of suspension.

28-15. If any summons or subpoena issued by a court or commission cannot be served upon the busman, cabman or coachman at his last Chicago address recorded in the office of the commission within sixty days after such process is delivered to the person authorized to serve it, and the busman, cabman, or coachman fails to appear in answer to such process for want of service, or if any busman, cabman or coachman shall refuse or fail to pay any judgment or award as provided in section 28-13, or shall lease or loan any of his licensed public passenger vehicles for operation by any person for hire or shall be convicted of a felony or any criminal offense involving moral turpitude, the mayor shall revoke all public vehicle licenses held by him.

If any public passenger vehicle license was obtained by application in which any material fact was omitted or

stated falsely, or if any public passenger vehicle is operated in violation of the provisions of this chapter for which revocation of the license is not mandatory, or if any public passenger vehicle is operated in violation of the rules and regulations of the commissioner relating to the administration and enforcement of the provisions of this chapter, the commissioner may recommend to the mayor that the public passenger vehicle license therefor be revoked and the mayor, in his discretion, may revoke said license.

Upon revocation of any license, the commissioner shall remove the license sticker emblem and the license card from the vehicle affected.

28-16. Every busman, cabman or coachman shall deliver or submit his public passenger vehicles for inspection or the performance of any other duty by the commissioner upon demand. It is unlawful for any person to interfere with or hinder or prevent the commissioner from discharging any duty in the enforcement of this chapter.

28-17. It is unlawful to permit more than one passenger to occupy the front seat with the chauffeur in any public passenger vehicle.

28-18. It is the duty of every busman, cabman or coachman to notify the commissioner whenever any change in his Chicago address is made. Any notice required to be given to the busman, cabman or coachman shall be sufficient if addressed to the last Chicago address recorded in the office of the commissioner.

28-19. No person shall be qualified for a livery vehicle license and a taxicab license at the same time; nor shall any person having a livery vehicle license be associated with anyone for sending or receiving calls for taxicab service.

No license for any livery vehicle shall be issued except in the annual renewal of such license or upon transfer to permit replacement of a vehicle for that licensed unless, after a public hearing, the commissioner shall determine that public convenience and necessity require additional

livery service and shall recommend to the council the maximum number of such licenses to be authorized by ordinance.

Not more than six passengers shall be accepted for transportation in a livery vehicle on any trip.

28-19.1. It is unlawful for any person to operate or drive a livery vehicle equipped with a meter which registers a charge or fare or indicates the distance traveled by which the charge or fare to be paid by a passenger is measured.

28-19.2. It is unlawful for any person to solicit passengers for transportation in a livery vehicle on any public way. No such vehicle shall be parked on any public way for a time longer than is reasonably necessary to accept passengers in answer to a call for service and no passengers shall be accepted for any trip in such vehicle without previous engagement for such trip, at a fixed charge or fare, through the station or office from which said vehicle is operated.

28-20. It is unlawful for the cabman of any livery vehicle, or the station from which it is operated to use the word "taxi", "taxicab" or "cab" in connection with or as part of the name of the cabman or his trade name.

The outside of the body of each livery vehicle shall be uniform black, blue or blue-black color. No light fixtures or lights shall be attached to or exposed so as to be visible outside of any livery vehicle, except such as are required by the law of the state of Illinois regulating traffic by motor vehicles and one rear red light in addition to those required by said law. No name, number or advertisement of any kind, excepting official license emblems or plates, shall be painted or carried so as to be visible outside of any livery vehicle.

It is unlawful for any person to hold himself out to the public by advertisement, or otherwise, to render any livery service unless he is the cabman of a licensed livery vehicle.

28-21. Sightseeing vehicles shall not be used for transportation of passengers for hire except on sightseeing tours or chartered trips. Passengers for sightseeing tours

shall not be solicited upon any public way except at bus stands specially designated by the council for sightseeing vehicles.

It is unlawful for any cabman or coachman to advertise his public passenger vehicle for hire on sightseeing tours.

28-22. Every taxicab shall be operated regularly to the extent reasonably necessary to meet the public demand for service. If the service of any taxicab is discontinued for any reason except on account of strike, act of God or cause beyond the control of the cabman, the commissioner may give written notice to the cabman to restore the taxicab to service, and if it is not restored within five days after notice, the commissioner may recommend to the mayor that the taxicab license be revoked and the mayor, in his discretion, may revoke same.

28-22.1. Not more than 3761 taxicab licenses shall be issued unless, after a public hearing, the commissioner shall report to the council that public convenience and necessity require additional taxicab service and shall recommend the number of taxicab licenses which may be issued. Notice of such hearing stating the time and place thereof shall be published in the official newspaper of the city at least twenty days prior to the hearing and by mailing a copy thereof to all taxicab licensees. At such hearing any licensee, in person or by attorney, shall have the right to cross-examine witnesses and to introduce evidence pertinent to the subject. At any time and place fixed for such hearing it may be adjourned to another time and place without further notice.

In determining whether public convenience and necessity require additional taxicab service, due consideration shall be given to the following:

1. The public demand for taxicab service;
2. The effect of an increase in the number of taxicabs on the safety of existing vehicular and pedestrian traffic;
3. The effect of increased competition,
 - (a) on revenues of taxicab licensees;

- (b) on cost of rendering taxicab service, including provisions for proper reserves and a fair return on investment in property devoted to such service;
- (c) on the wages or compensation, hours and conditions of service of taxicab chauffeurs;
- 4. The effect of a reduction, if any, in the level of net revenues to taxicab licensees on reasonable rates of fare for taxicab service;
- 5. Any other facts which the commissioner may deem relevant.

If the commissioner shall report that public convenience and necessity require additional taxicab service, the council, by ordinance, may fix the maximum number of taxicab licenses to be issued, not to exceed the number recommended by the commissioner.

28-23. Every taxicab shall have the cabman's name, telephone number and the public passenger vehicle license number plainly painted in plain Gothic letters and figures of three-eighth inch stroke and at least two inches in height in the center of the main panel of the rear doors of said vehicle. In lieu of the cabman's telephone number the name and telephone number of any corporation or association with which the cabman is affiliated may be painted in the same manner, provided such corporation or association shall have assumed equal liability with the cabman for any loss or damage resulting from any occurrence arising out of or caused by the operation or use of any of the cabman's taxicabs and shall carry and furnish to the commissioner public liability and property damage insurance to secure payment of such loss or damage as provided in section 28-12. The public vehicle license number assigned to any taxicab shall be assigned to the same vehicle or to any vehicle substituted therefor upon annual renewal of the license. No other name, number or advertisement of any kind, excepting signs required by this chapter, official license emblems or plates and a trade emblem, in a manner approved by the commissioner, shall be painted or carried so as to be visible on the outside of any taxicab.

28-24. Every taxicab shall be equipped with a taximeter connected with and operated from the transmission of the taxicab to which it is attached. The taximeter shall be equipped with a flag at least three inches by two inches in size. The flag shall be plainly visible from the street and shall be kept up when the taxicab is for hire and shall be kept down when it is engaged.

Taximeters shall have a dial or dials to register the tariff in accordance with the lawful rates and charges. The dial shall be in plain view of the passenger while riding and between sunset and sunrise the dial shall be lighted to enable the passenger to read it.

It is unlawful to operate a taxicab for hire within the city unless the taximeter attached thereto has been sealed by the commission.

28-25. At the time a taxicab license is issued and semi-annually thereafter the taximeter shall be inspected and tested by the commissioner to determine if it complies with the specifications of this chapter and accurately registers the lawful rates and charges. If it is in proper condition for use, the taximeter shall be sealed and a written certificate of inspection shall be issued by the commissioner to the cabman. Upon complaint by any person that a taximeter is out of working order or does not accurately register the lawful rates and charges it shall be again inspected and tested and, if found to be in improper working condition or inaccurate, it shall be unlawful to operate the taxicab to which it is attached until it is equipped with a taximeter which has been inspected and tested by the commissioner, found to be in proper condition, sealed and a written certificate of inspection therefor is issued.

The cabman or person in control or possession of any taxicab shall deliver it with the taximeter attached or deliver the taximeter detached from the taxicab for inspection and test as requested by the commissioner. The cabman may be present or represented when such inspection and test is made.

28-26. It is unlawful for any person to tamper with, mutilate or break any taximeter or the seal thereof or to

transfer a taximeter from one taxicab to another for use in transportation of passengers for hire before delivery of the taxicab with a transferred taximeter for inspection test and certification by the commissioner as provided in section 28-25.

28-27. The fee for each certificate of inspection shall be three dollars, but no charge shall be made for any certificate when the inspection and test is made upon complaint, and it is found that the taximeter is in proper working condition and accurately registers the lawful rates and charges.

28-28. It is unlawful to refuse any person transportation to any place within the city in any taxicab which is unoccupied by a passenger for hire unless it is on its way to pick up a passenger in answer to a call for service or it is out of service for any other reason. When any taxicab in answering a call for service or is otherwise out of service it shall not be parked at a cabstand, and no roof light or other special light shall be used to indicate that the vehicle is vacant or subject to hire. A white card bearing the words "Not For Hire" printed in black letters not less than two inches in height shall be displayed on the windshield of such taxicab.

28-29. Group riding is prohibited in taxicabs, except as directed by the passenger first engaging the taxicab. Not more than five passengers shall be accepted for transportation on any trip; provided that additional passengers under twelve years of age accompanied by an adult passenger shall be accepted if the taxicab has seating capacity for them.

28-29.1. No passenger shall be permitted to ride on the front seat with the chauffeur of the taxicab unless all other seats are occupied.

28-30. Rates of fare for taxicabs shall be as follows:

For the first one-quarter of a mile or fraction thereof for one person	25 cents
For each additional one-half of a mile or fraction thereof for one person	10 cents

For each additional person of twelve years
or more for the whole trip10 cents
For each three minutes of waiting time or
fraction thereof10 cents

Waiting time shall include the time beginning three minutes after call time at the place to which the taxicab has been called when it is not in motion, the time consumed by unavoidable delays at street intersections, bridges or elsewhere and the time consumed while standing at the direction of a passenger.

Every passenger under twelve years of age when accompanied by an adult shall be carried without charge.

Ordinary hand baggage of passengers shall be carried without charge. A fee of twenty-five cents may be charged for carrying a trunk, but no trunk shall be carried except inside of the taxicab.

Immediately on arrival at the passenger's destination it shall be the duty of the chauffeur to throw the taximeter lever to the non-recording position and to call the passenger's attention to the fare registered.

It is unlawful for any person to demand or collect any fare for taxicab service which is more or less than the rates established by the foregoing schedule, or for any passenger to refuse payment of the fare so registered.

28-31. Terminal vehicles shall not be used for transportation of passengers for hire except from railroad terminal stations and steamship docks to destinations in the area bounded on the north by E. and W. Ohio Street; on the west by N. and S. Desplaines Street; on the south by E. and W. Roosevelt Road; and on the east by Lake Michigan.

28-31.1. No license for any terminal vehicle shall be issued except in the annual renewal of such license or upon transfer to permit replacement of a vehicle for that licensed unless, after a public hearing held in the same manner as specified for hearings in Section 28-22.1, the commissioner shall report to the council that public convenience and necessity require additional terminal vehicle service and shall recommend the number of such vehicle licenses which may be issued.

In determining whether public convenience and necessity require additional terminal vehicle service due consideration shall be given to the following:

1. The public demand for such service;
2. The effect of an increase in the number of such vehicles on the safety of existing vehicular and pedestrian traffic in the area of their operation;
3. The effect of an increase in the number of such vehicles upon the ability of the licensee to continue rendering the required service at reasonable fares and charges to provide revenue sufficient to pay for all costs of such service, including fair and equitable wages and compensation for licensee's employees and a fair return on the investment in property devoted to such service;
4. Any other facts which the commissioner may deem relevant.

If the commissioner shall report that public convenience and necessity require additional terminal vehicle service, the council, by ordinance, may fix the maximum number of terminal vehicle licenses to be issued not to exceed the number recommended by the commissioner.

28-31-2. The rate of fare for local transportation of every passenger in terminal vehicles of the licensee shall be uniform, regardless of the distance traveled; provided that children under 12 years of age, when accompanied by an adult, shall be carried at not more than half fare. Such rates of fare shall be posted in a conspicuous place or places within each vehicle as determined by the commissioner.

28-32. Any person violating any provision of this chapter for which a penalty is not otherwise provided shall be fined not less than \$5.00 nor more than \$100.00 for the first offense, not less than \$25.00 nor more than \$100.00 for the second offense during the same calendar year, and not less than \$50.00 nor more than \$100.00 for the third and succeeding offenses during the same calendar year, and each day that such violation shall continue shall be deemed a separate and distinct offense.

APPENDIX B.

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 11692 SEPTEMBER TERM, 1956; SEPTEMBER SESSION, 1956

THE ATCHISON, TOPEKA AND SANTA
FE RAILWAY, et al.,

Plaintiffs-Appellants,

v.

CITY OF CHICAGO, a municipal cor-
poration, et al.,

Defendants-Appellees,

and

P A R M E L E E TRANSPORTATION COM-
PANY,

Defendant-Intervenor-Appellee.

Appeal from the
United States Dis-
trict Court for the
Northern District
of Illinois, Eastern
Division.

January 17, 1957.

Before MAJOR, SWAIM and SCHNACKENBERG, *Circuit
Judges.*

SCHNACKENBERG, *Circuit Judge.* Twenty-one railroads,
herein sometimes referred to as Terminal Lines, and Rail

¹ The Atchison, Topeka and Santa Fe Railway Company; The Baltimore and Ohio Railroad Company; The Chesapeake and Ohio Railway Company; Chicago, Burlington & Quincy Railroad Company; Chicago & Eastern Illinois Railroad Company; Chicago Great Western Railway Company; Chicago, Indianapolis and Louisville Railway Company; Chicago Milwaukee, St Paul & Pacific Railroad Company; Chicago North Shore and Milwaukee Railway; Chicago and North Western Railway Company; Chicago, Rock Island & Pacific Railroad Company; Chicago South Shore and South Bend Railroad; Erie Railroad Company; Grand Trunk Western Railroad Company; Gulf, Mobile and Ohio Railroad Company; Illinois Central Railroad Company; Minneapolis, St. Paul & Sault Ste. Marie Railroad Company; The New York Central Railroad Company; The New York, Chicago and St. Louis Railroad Company; The Pennsylvania Railroad Company; and the Wabash Railroad Company.

road Transfer Service, Inc., sometimes herein referred to as Transfer, on October 24, 1955 brought an action in the district court against defendant City of Chicago, sometimes herein referred to as the city, and certain officials thereof.² Plaintiffs' complaint seeks a declaratory judgment and injunctive relief against the enforcement against them of an ordinance known as chapter 28 of the municipal code of Chicago, as amended by an ordinance enacted July 26, 1955. Plaintiffs asked the district court to declare by its judgment, *inter alia*, that the ordinance, as amended in 1955, is void as applied to them.

Parmelee Transportation Company, sometimes herein referred to as Parmelee, on its petition was granted leave to intervene as a defendant.³

On motion of defendants, other than Parmelee, pursuant to rule 56 of the federal rules of civil procedure,⁴ and on the pleadings, affidavits and exhibits submitted by all parties, the district court on January 12, 1956 granted a summary judgment against plaintiffs and dismissed their action.⁵ 136 F. Supp. 476. From said judgment this appeal was taken.⁶

The undisputed facts we now set forth.

There are eight passenger terminals in downtown Chicago, each being used by from one to six railroads. No one railroad passes through Chicago, but about 3900 railroad passengers daily travel through Chicago on continuous journeys which begin and end at points outside Chicago. At Chicago, they transfer from an incoming, to an outgoing, railroad. The only practical method of transferring

² Richard J. Daley, as mayor; John C. Melaniphy, as acting corporation counsel; Timothy P. O'Connor, as commissioner of police; and William P. Flynn, as public license commissioner.

³ The district court considered the petition as an answer to the complaint.

⁴ Fed. Rules of Civil Procedure, rule 56, 28 U.S.C.A.

⁵ On the same day the district court filed "findings of fact" and "conclusions of law", one conclusion being that there is no genuine issue of fact involved in this controversy.

⁶ On January 13, 1956 the district court ordered that defendants, other than Parmelee, be enjoined from enforcing the ordinance in question against plaintiffs upon the latter filing supersedeas bond of \$50,000. It is our understanding that this bond was filed.

these passengers between the different terminal stations is by motor vehicle equipped to carry them and their hand baggage simultaneously. More than 99 per cent of the passengers so transferred between terminal stations are traveling on through tickets between points of origin and destination located in different states. They are carried over public ways of the city.

Transfer began its operations on October 1, 1955, but has not applied to the city for public passenger terminal vehicle licenses. These transfer operations are required by a tariff filed with the Interstate Commerce Commission.⁷ They have been provided for by tariffs for more than the past forty years.

Pursuant to such tariffs a passenger traveling through Chicago purchases at his point of origin a railroad ticket composed of a series of coupons covering his complete transportation to his destination. If his through journey requires him to transfer from one railroad passenger terminal in Chicago to another, a part of his ticket consists of a coupon good for the transfer of himself and his hand baggage between such terminals. The expense of the required transfer service is absorbed by the railroads.

The tariffs provide that any such required transfer service shall be without additional charge where a one-way fare from Chicago to destination would be more than a specified minimum sum. Where such fare would be less

⁷ Local and Joint Passenger Tariff No. 3 governing, *inter alia*, passengers and baggage transfer between stations in Chicago, was filed with the Interstate Commerce Commission on behalf of Terminal Lines. On page 11 of said tariff, in Section 2 thereof, the Terminal Lines are listed according to the Chicago stations which they enter and it is set forth in Section 2 thereof that transfer is required between all railroad stations when transfer is necessary, and in Column 4 appears "Passenger transfer included", while in Column 5 there appears "Transfer of all baggage included".

Page 5 of said tariff in Section 1 thereof provides in rule 4, in part, as follows:

"Through Transportation. (a) Where it is designated in Column 4 Section 2, that passenger transfer is included, transfer coupon must be included in through ticket without additional collection."

And rule 6 in Section 1, in part, provides:

"Through Transportation. (a) Where it is designated in Column 5 Section 2, that baggage transfer is included, baggage may be checked through without additional collection."

than such minimum, a fixed charge which varies with the fare must be added to cover the required transfer service.

Prior to October 1, 1955, there had existed for many years arrangements between the Terminal Lines and Parmelee whereby it furnished this service for coupon-holding passengers. On June 13, 1955, the Terminal Lines ended their arrangement with Parmelee effective September 30, 1955. Under date of October 1, 1955, the Terminal Lines and Transfer executed a contract. In brief, this contract^a provides that, upon delivery of a transfer coupon to Transfer by a through-passenger, it will carry him and his hand baggage from the incoming to the appropriate outgoing station without charge. Transfer is compensated by the outgoing terminal railroad. Transfer is given the exclusive right to perform this transfer service. Transfer devotes its vehicles exclusively to service under the contract.^b

On and prior to June 13, 1955, there was in effect an ordinance of the city, being said chapter 28 of the municipal code, consisting of sections 28-1 to 28-32,¹⁰ for the regulation of "Public Passenger Vehicles." Section 28-1 contained the following definitions, *inter alia*:

"'Public passenger vehicle' means a motor vehicle, as defined in the Motor Vehicle Law of the State of Illinois; which is used for the transportation of passengers for hire, excepting those devoted exclusively for funeral use or in operation of a metropolitan transit authority or public utility under the laws of Illinois."

* * *

"'Terminal vehicle' means a public passenger vehicle which is operated under contracts with railroad

^a On or about September 19, 1955, the railroads filed copies of the contract with the Interstate Commerce Commission and with the Illinois Commerce Commission.

^b The contract also provides that Transfer shall perform certain additional baggage transfer services for Terminal Lines. The transfer of a passenger's checked baggage by Transfer in vehicles other than "terminal vehicles", although covered by terms of the contract between Terminal Lines and Transfer, as well as actually performed by Parmelee prior to October 1, 1955, is not involved in this case.

¹⁰ Herein sometimes referred to as the prior ordinance.

and steamship companies, exclusively for the transfer of passengers from terminal stations."

Section 28-31 provided:

"28-31. No person shall be qualified for a terminal vehicle license unless he has a contract with one or more railroad or steamship companies for the transportation of their passengers from terminal stations.

"It is unlawful to operate a terminal vehicle for the transportation of passengers for hire except for their transfer from terminal stations to destinations in the area bounded on the north by E. and W. Ohio Street; on the west by N. and S. Desplaines Street; on the south by E. and W. Roosevelt Road; and on the east by Lake Michigan."

Certain other parts of chapter 28 incorporated regulations enacted pursuant to the police power of the city.¹¹

Parmelee was, on and prior to September 30, 1955, the only person having a transfer contract with the Terminal Lines and licensed to operate terminal vehicles under the ordinance.

At a meeting of the committee on local transportation of the Chicago city council held on July 21, 1955, the chairman stated that recently he had been advised by the Vehicle License Commissioner that he had received a communication from Parmelee advising that its contract with the railroads was to be canceled out in September of that year, "which would make it appear that the railroads were taking the position of dictating who would or could operate terminal vehicles in Chicago; that he did not think that was right and had prepared an ordinance with the assistance of Mr. Gross, and had it introduced in the city council and referred it to the committee; that subsequently he had discussed said ordinance with Mr. Grossman of

¹¹ These are provisions for granting and suspension of licenses, safety regulations based on the type of vehicle, number of passengers permitted, condition and maintenance of vehicles, inspection thereof, etc., financial responsibility of operators, investigation of character of prospective licensees and continuing supervision thereof, requirements for maintenance of adequate insurance, determination of public convenience and necessity with respect to number of certain intrastate vehicles, i.e. livery and taxicabs, which are to be permitted on the city streets, and regulation of taxi fares through meters.

the corporation counsel's office and that, as a result of his conference with Mr. Grossman, it would appear that, while he was on the right track in the matter, his method of approach was wrong."

Mr. Grossman informed the committee that he had looked over the ordinance "as introduced" by the chairman and was of the opinion that it was not in proper form; but that he believed the objective could be obtained in some other way. He said he would endeavor to prepare and submit an ordinance on this subject.

The chairman's proposed ordinance, which met with Mr. Grossman's objection as to form, and which was laid aside, in brief would have granted an exclusive franchise for ten years to Parmelee for the operation of terminal vehicles to transfer passengers and their baggage between railroad stations.¹²

On July 26, 1955, the chairman stated that the committee was in session to receive a report from Mr. Grossman who had prepared a substitute ordinance which would accomplish what the committee had in mind, namely, placing the licensing and operation of terminal vehicles under the complete control of the city of Chicago, whereas, as the code then provided, the only one who could secure a license for the operation of a terminal vehicle was someone who had a contract with the railroads.

On recommendation of the committee, the council on the same day passed the ordinance now under attack.¹³

1. The city and Parmelee concede that Transfer is engaged in interstate commerce. In *United States v. Yellow*

¹² §2 read: "Subject to all the conditions of this ordinance, exclusive permission and authority is hereby granted to the licensee to operate terminal vehicles in the City for a period of ten (10) years, commencing on . . . , 1955, and ending on . . . , 1965."

§4 provided: "It is unlawful for any person to be an operator of one or more terminal vehicles on any public way from place to place within the corporate limits of the city unless such terminal vehicles are licensed by the City as terminal vehicles. * * *"

§11 provided: "Upon the effective date of this ordinance, the commissioner shall issue licenses hereunder to licensee in not to exceed the number of licenses held by such licensee on April 1, 1955. * * *"

¹³ Herein sometimes referred to as the 1955 ordinance.

Appellees attempt to distinguish the case of *Frost v. Corporation Commission*, 278 U. S. 515 (1929) and *Alton Railroad v. United States*, 315 U. S. 15 (1942) on the slim ground that there is here involved only a "license" and not a "franchise". As Judge Biggs said in *Seatrail Lines v. United States*, 64 F. Supp. 156 (D. Del., 1946), "Whether the certificate when issued be called a "franchise" or not is relatively unimportant. Whatever be its name, it is a creature of the statute."

The case of *Chicago v. Chicago Rapid Transit Co.*, 284 U. S. 577 (1931) is, of course, inapposite. The standing of the City of Chicago to appeal in that case was dismissed on the oft-repeated doctrine that municipal corporations, created by the state for the better ordering of government and being subject to abolition by the state at any time, have no privileges or immunities under the federal Constitution which they may invoke in opposition to the will of the state. *Pawhuska v. Pawhuska Oil & Gas Co.*, 250 U. S. 394 (1919). The other cases offered by the appellees in support of their position (see Motion to Dismiss or Affirm, p. 3) are concerned with the right of a utility to attack the constitutionality of a legislative or administrative act of the government which would create or authorize competition with the attacking utility. It is not the appellant, here, but the appellees which have attacked the government's action as unconstitutional. The appellant is not contending for any right to be free from competition or from the regulations imposed by the ordinance, it is urging only that it has a right to require that the competition fulfill the same requirements which are imposed by what is manifestly a valid municipal ordinance.

There are several judicially created doctrines for the purpose of avoiding constitutional questions, of which one is the stringent requirement as to the status of a party

Cab Co., 332 U.S. 218, 228, Parmelee's operation (including that part now being carried on by Transfer) was held to be an integral step in an interstate movement and, therefore, a constituent part of interstate commerce.¹⁴ The court pointed out that Chicago is the terminus of a large number of railroads engaged in interstate passenger traffic and that a great majority of the persons making interstate railroad trips which carry them through Chicago must disembark from a train at one railroad station, travel from that station to another some two blocks to two miles distant, and board another train at the latter station; that Parmelee had contracted with the railroads to provide this transportation by special cabs carrying seven to ten passengers. The court said that Parmelee's contracts were exclusive in nature, adding:

"The transportation of such passengers and their luggage between stations in Chicago is clearly a part of the stream of interstate commerce. When persons or goods move from a point of origin in one state to a point of destination in another, the fact that a part of that journey consists of transportation by an independent agency solely within the boundaries of one state does not make that portion of the trip any less interstate in character. *The Daniel Ball*, 10 Wall. 557, 565. That portion must be viewed in its relation to the entire journey rather than in isolation. So viewed, it is an integral step in the interstate movement. See *Stafford v. Wallace*, 258 U.S. 495."

"Any attempt to monopolize or to impose an undue restraint on such a constituent part of interstate commerce brings the Sherman Act into operation. * * *"

Obviously these holdings conform with the following well-established principles: (1) a state may not obstruct or lay a direct burden on the privilege of engaging in interstate commerce, *Furst v. Brewster*, 282 U.S. 493, 498; *Mich. Com. v. Duke*, 266 U.S. 570, 577, 69 L. ed. 445; but (2) nevertheless it may incidentally and indirectly affect it

¹⁴ The destination intended by the passenger when he begins his journey and known to the carrier, determines the character of the commerce, whether interstate or not. *Sprout v. South Bend*, 277 U.S. 163, 168.

to attack the validity of a statute, ordinance, or administrative regulation. That policy is expressed in the cases cited by the appellees. Obviously that policy should not be given any weight in considering the standing of the appellant to protect its economic interests by the maintenance of an appeal in which it is seeking to assert the validity of governmental action, not the opposite.

II.

IRRESPECTIVE OF HOW MUCH OF THE ORDINANCE WAS HELD INVALID BY THE COURT OF APPEALS ITS DECISION WAS ERRONEOUS AND IN CONFLICT WITH THE DECISIONS OF THIS COURT.

We quite agree with the appellees that there is room for doubt and difference of opinion as to the scope of the ruling of the Court of Appeals that the ordinance in question was unconstitutional. This, however, is a consideration calling for the exercise of this Court's reviewing power not for abstention from review. In our petition for rehearing in the Court of Appeals, we pointed out that the very language of the Court of Appeals which is quoted at page 5 of Appellees' Motion to Dismiss or Affirm "interjects great uncertainty and confusion in the judgment of the Court." We were unsure then, as we are unsure now, precisely to what extent the Court of Appeals meant to invalidate the ordinance. However, our statement that the Court of Appeals has "stricken down the City's plan for regulating terminal vehicles in the interest of public safety and welfare" is amply supported. Appellees sought a declaration that Chapter 28 of the Municipal Code of Chicago was void as applied to them. They sought also an injunction restraining the City from enforcing the ordinance as a whole against them. (Tr. p. 22.) The District Court denied relief. The Court of Appeals reversed. Transfer

by a bona fide, legitimate, and reasonable exercise of its police power. 15 C.J. S. 266. In *Dahnke-Walker Co. v. Bondurant*, 257 U.S. 282, 290, the court said:

“The commerce clause of the Constitution, Art. I, §8, cl. 3, expressly commits to Congress and impliedly withholds from the several States the power to regulate commerce among the latter. Such commerce is not confined to transportation from one State to another, but comprehends all commercial intercourse between different States and all the component parts of that intercourse. * * *

The power here referred to may be exercised, not only in an act of Congress, but also in a regulation by the Interstate Commerce Commission. 15 C.J.S. 274.

Part I of the Interstate Commerce Act¹⁵ deals with railroads as well as other subjects not relevant here. §3 (3) thereof, in its presently pertinent provisions, appeared in the original act of February 4, 1887.¹⁶ It provides that all carriers of passengers subject to the act shall afford all reasonable facilities for the interchange of traffic between their respective lines and for the receiving, forwarding and delivering of passengers to and from connecting lines.¹⁷ *Central Transfer Co. v. Terminal R. R.*, 288 U.S. 469, 473, note 1.

Part II of the same act¹⁸ deals with motor carriers. As amended in 1940, 302(c)¹⁹ provides as follows:

§202(c) “Notwithstanding any provision of this section or of section 203; the provisions of this part, [Part II], except the provisions of section 204 relative to qualifications and maximum hours of service of employees and safety of operation and equipment, shall not apply—

¹⁵ 49 U.S.C.A. §§1-27.

¹⁶ §3, second unnumbered paragraph, 24 Stat. 380.

¹⁷ There is no warrant for limiting the meaning of “connecting lines” to those having a direct physical connection. The term is commonly used as referring to all the lines making up a through route. *Atlantic Coast Line R. Co. v. U. S.*, 284 U.S. 278, 293.

¹⁸ 49 U.S.C.A. §§301-327, (1951 ed.).

¹⁹ 56 Stat. 390, where this section is known as section 202(c).

“(1) to transportation by motor vehicle by a carrier by railroad subject to part I, * * * incidental to transportation or service subject * * * [thereto] in the performance within terminal areas of transfer, collection, or delivery services; but such transportation shall be considered to be and shall be regulated as transportation subject to part I when performed by such carrier by railroad * * *;

“(2) to transportation by motor vehicle by any person (whether as agent or under a contractual arrangement) for a common carrier by railroad subject to part I, * * * in the performance within terminal areas of transfer, collection, or delivery service; but such transportation shall be considered to be performed by such carrier, * * * as part of, and shall be regulated in the same manner as, the transportation by railroad, * * * to which such services are incidental.”

In Part I, §6(1) of the Interstate Commerce Act²⁰ requires every common carrier to file with the commission tariffs (therein referred to as schedules), for transportation, including joint rates over through routes. In this respect a tariff is to be treated the same as a statute. *Pennsylvania R. Co. v. International Coal Min. Co.*, 230 U.S. 183, at 197, 57 L. ed. 1446, 1451.

Relevant tariffs were filed with the Interstate Commerce Commission on behalf of the Terminal Lines.

The agreement of October 1, 1955²¹ obligates Transfer to perform all the required passenger and hand baggage transfer service from the terminal station in Chicago of each incoming line to the terminal station in Chicago of each outgoing line, all at the expense of the latter, for the period beginning October 1, 1955 and ending September 30, 1960. This service (which has been since October 1, 1955 performed by Transfer) replaced the Parmelee service, with the exception of two types of operations local

²⁰ 49 U.S.C.A. §6(1).

²¹ The Baltimore and Ohio Chicago Terminal Railroad Company; Chicago and Western Indiana Railroad Company and Chicago Union Station Company, therein referred to as “depot companies”, are also parties to said agreement. That fact is not controlling in the decision of this case.

in their nature,²² consisting of (a) transportation of friends or relatives accompanying a coupon holder between stations, and (b) transportation of a coupon holder to any hotel or other terminus "in the loop district of Chicago", as requested of the driver by the coupon holder.

2. We conclude that Transfer is an instrumentality used by Terminal Lines in interstate commerce and is subject to control of the federal government. We also conclude that the city can neither give nor take away such authority of Transfer to operate and that the city has no power of control over Transfer, except the control which it has generally in exercising its police power pertaining to such matters as public safety, maintenance of streets and the convenient operation of traffic. For a more detailed statement of the scope of such police power, see *Continental Baking Co. v. Woodring*, 286 U.S. 352.

This is not a case in which a motor vehicle operator is denied the privilege of operating on a particular highway because of the congestion of traffic thereon, such as was true in *Bradley v. Public Utility Commission*, 289 U.S. 92, (on which, for some reason not clear to us, the city relies), but rather we have a case where an ordinance, in effect, bars Transfer from the entire network of highways within the downtown area of Chicago.

Pursuant to federal law, Terminal Lines have assumed an obligation to furnish the service in question as an interstation link in interstate commerce. The integration of this service with the complex, and occasionally changing, schedules of the Terminal Lines and the ebb and flow of passenger traffic existing in the various stations, requires a continuing and intimate knowledge thereof, which the Terminal Lines possess. The city is not equipped to function effectively in this area. It follows that the choice as to the instrumentality to be used for that purpose properly belongs to the Terminal Lines. These facts preclude the selection of an operator of terminal vehicles by anyone other than the Terminal Lines. While the city has power to regulate the operation of terminal vehicles incidently

²² See *Status of Parmelee Transp. Co.*, 288 I.C.C. 95, at 100.

to its regulation of street traffic generally, it has no power, directly or indirectly, to designate who shall own or operate such vehicles. The prior ordinance recognized this situation. It was limited to terminal vehicles having contracts with the Terminal Lines and, as to which vehicles, it exercised certain police powers of the city relating to traffic regulation. That ordinance made no attempt, and it was not intended, to select the operator of the service. In contrast, the 1955 ordinance consists of provisions which, in effect, name Parmelee as the exclusive operator of terminal vehicles in Chicago even though it has no contract with the Terminal Lines which are under a federally imposed obligation to furnish this terminal facility. Each of the Terminal Lines, which sells through tickets calling for interstate transportation in Chicago, thereby assumes an individual obligation to the passenger to furnish that service. Yet, under the 1955 ordinance, that railroad would have no direct control over the operator of that service and no opportunity to protect itself by an agreement indemnifying it from claims of passengers for damages arising out of the negligence of the operator. Other obvious considerations point to the practical necessity of a continuing control by the Terminal Lines of the instrumentality furnishing the service covered by the coupons sold by those lines to interstate passengers.

3. However, the city contends that the 1955 ordinance not only retains the police regulations of the prior ordinance, but demonstrates the city's concern with all passenger vehicles for hire, and specifically with the effect of the number of taxicabs as well as terminal vehicles on the safety of existing vehicular and pedestrian traffic. The city contends that in this respect the ordinance is valid as an exercise of the police power.

But the Terminal Lines argue that the 1955 ordinance was adopted for the sole and evident purpose, not of police power regulation, but of economic regulation. They say that, not only would the 1955 ordinance add nothing in respect to police power regulations that were not contained in the prior ordinance, but that the 1955 ordinance added

"elaborate requirements for proof of public convenience and necessity and other elements of economic regulation of interstate commerce * * *." They add "that these new economic regulations would apply to all except Parmelee; Parmelee was granted a perpetual franchise free from these requirements. The amendment eliminated the requirement that no one could obtain a license unless he had a contract for interstation transfer with the railroads. The amendment unmistakably marked the ordinance as economic regulation not within the city's power."

Significant is §28-31.1 of the 1955 ordinance which provides that no license for any terminal vehicle shall be issued except in the annual renewal of such license or upon transfer to permit replacement of a vehicle for that licensed, unless, after a public hearing, the commissioner shall report to the council that public convenience and necessity require additional terminal vehicle service and shall recommend the number of such vehicle licenses which may be issued. It is further provided that, in determining whether public convenience and necessity require such additional service, the following, *inter alia*, shall be considered: "2. The effect of an increase in the number of such vehicles on the safety of existing vehicular and pedestrian traffic in the area of their operation; * * *".

Terminal Lines argue that these are the only provisions of the 1955 ordinance which could even appear to relate to public safety. But they aver that, as a purported safety measure, this is sham and spurious.

To us it appears that the cost of maintaining the terminal vehicle service, which is initially borne by Transfer and ultimately, to the extent of coupons issued and used, by the individual Terminal Lines, will operate effectively as an economic brake upon any unjustified increase in the number of such vehicles. Moreover, if and when a greater number is demanded by the growth of interstate passenger traffic, the city would then have no right, in the guise of an exercise of its police power, to cripple interstate commerce by preventing a justifiable increase in the number of such vehicles required to meet the needs of that commerce.

‘We are thus led to conclude that there is no valid legal basis for the above-cited provisions of §28-31.1 of the 1955 ordinance. We are convinced that those provisions, which would in effect limit the number of terminal vehicle licenses to those held by Parmelee on July 26, 1955 and give Parmelee perpetual control thereof, constitute a designation of Parmelee by the council of the city, in lieu of Transfer, the instrumentality selected by the Terminal Lines, rather than an exercise of the city’s police power over traffic. In this critical aspect the 1955 ordinance is invalid. If there were any doubt that this conclusion is correct, the legislative history of the ordinance dispels that doubt.

At meetings of the committee which recommended the 1955 ordinance for passage, the committee chairman made it clear that the objective sought was the assumption by the city of the authority to designate the instrumentality which was to operate terminal vehicles between railroad stations in Chicago. The proceedings of the committee fail to indicate that the chairman or any member of the committee was interested in traffic regulations or any other aspect of the city’s police power.

In attempting to justify the 1955 ordinance, which admittedly retained police regulations contained in the prior ordinance, the city points to photographs of two transfer vehicles which, the city says, do not comply with retained §28-4.1, which provides that no vehicle having a seating capacity for more than 7 passengers shall be licensed as a public passenger vehicle unless at least 3 doors on each side or a fixed aisle space is provided, and retained §28-17, which provides that it is unlawful to permit more than one passenger to occupy the front seat with the chauffeur. There is no indication in the record that any terminal vehicles used by Transfer, except the two appearing in the photographs, violate §28-4.1. Even if §28-4.1 and §28-17 are violated, that fact does not empower the city to bar, or even suspend, the operations of Transfer. *Castle v. Hayes Freight Lines*, 348 U.S. 61. The fact that Hayes was operating trucks under a federal certificate of convenience and necessity, under Part II of

the Interstate Commerce Act,²³ does not distinguish that case in principle from the present case in which Transfer is engaged in a federally authorized activity. See 49 U.S.C.A. §302(c)(2), *supra*. If Transfer's vehicles do not conform to the requirements contained in the prior ordinance,²⁴ the city may refuse to issue licenses for the non-conforming vehicles and penalize their unlicensed operation in accord with §28-32. So, also, whenever Transfer is found guilty of violating §28-17 the city may proceed against it according to the penalties section.²⁵

Undoubtedly the city has power to require that one engaged exclusively in interstate commerce may be required to procure from the city a license granting permission to use its highways and in addition pay a license fee demanded of all persons using automobiles on its highways as a tax for the maintenance of the highways and the administration of the laws governing the same. Highways being public property, users of them, although engaged exclusively in interstate commerce, are subject to regulation by the state or municipality to ensure safety and convenience and the conservation of the highways. Users of them, although engaged exclusively in interstate commerce, may be required to contribute to their cost and upkeep. Common carriers for hire, who make the highways their place of business, may properly be charged a tax for such use. *Clark v. Poor*, 274 U.S. 554, 557.

Both the language of the 1955 ordinance and its legislative history point to the fact that it is not legislation governing the manner of conducting a business or providing for a contribution toward the expense of highway maintenance, but that it requires a license, the granting of which, in turn, is made dependent upon the consent of the

²³ 49 U.S.C.A. §301, *et seq.*

²⁴ Ch. 28, Chicago Municipal Code.

²⁵ §28-32. "Any person violating any provision of this chapter for which a penalty is not otherwise provided shall be fined not less than \$5.00 nor more than \$100.00 for the first offense, not less than \$25.00 nor more than \$100.00 for the second offense during the same calendar year, and not less than \$50.00 nor more than \$100.00 for the third and succeeding offenses during the same calendar year and each day that such violation shall continue shall be deemed a separate and distinct offense."

city to the prosecution of a business. This is not a valid requirement. See *Sault Ste. Marie v. International Transit Company*, 234 U.S. 333, 340, 58 L. ed. 1337, 1340.

As we have seen, the 1955 ordinance eliminated from §28-1 of the prior ordinance a requirement that a terminal vehicle must be operated under contracts with railroad and steamship companies, and, by a new section, §28-31.1, in effect permitted Parmelee's existing terminal vehicle licenses to become perpetual by means of annual renewal or by transfer to a replacement vehicle, and also provided, in effect, that Transfer could not obtain any terminal vehicle license unless it proved to the satisfaction of the public vehicle license commissioner "that public convenience and necessity shall require additional terminal vehicle service".

In *Buck v. Kuykendall*, 267 U.S. 9307, it appears that Buck wished to operate an autostage line as a common carrier for hire for through interstate passengers, over a public highway in the state of Washington. Having complied with the state laws relating to motor vehicles and owners and drivers, and alleging willingness to comply with all applicable regulations concerning common carriers, Buck applied to the state for a prescribed certificate of public convenience and necessity. It was refused on the ground that the territory involved was already being adequately served by the holder of a certificate and that adequate transportation facilities were already being provided by four connecting autostage lines, all of which held such certificates from the state. The state relied upon its statute which prohibited common carriers for hire from using the highways by auto vehicles between fixed termini, or over regular routes, without having first obtained from the state a certificate of public convenience and necessity. Speaking of that statute, the court said, at 315:

"... Its primary purpose is not regulation with a view to safety or to conservation of the highways, but

the prohibition of competition. It determines not the manner of use, but the persons by whom the highways may be used. It prohibits such use to some persons while permitting it to others for the same purpose and in the same manner. * * * Thus, the provision of the Washington statute is a regulation, not of the use of its own highways, but of interstate commerce. Its effect upon such commerce is not merely to burden but to obstruct it. Such state action is forbidden by the Commerce Clause. * * * ”

To the same effect is *Mayor of Vidalia v. McNeely*, 274 U.S. 676, at 683.²⁶

4. We hold that it was unnecessary for Transfer to apply for licenses under the 1955 ordinance, because the issuance thereof unlawfully required a consent by the city to the prosecution of Transfer's business and was not merely a step in the regulation thereof. Being unnecessary, the relief prayed for herein may be granted without a showing that such application had been made before this suit was filed.

For the reasons hereinbefore set forth, the judgment of the district court is reversed and this cause is remanded to that court for further proceedings not inconsistent with the views herein set forth.

REVERSED AND REMANDED.

²⁶ Both sides in the case at bar rely on *Columbia Terminals Co. v. Lambert*, 30 F. Supp. 28, appeal dismissed, 309 U.S. 620. The court there said that the question whether the state could demand that Columbia Terminals prove that its interstate commerce transfer operation would benefit the state, in order to obtain a state permit therefor, was not before it, because the state expressly admitted it lacked such power and made no such demand. The court said, at 31:

“Since this statute applies to interstate as well as intrastate contract haulers, if the complaint alleged and the evidence disclosed such action on the part of the State Commission, plaintiff would be entitled to relief from such action on the part of the state officials. * * * But when the State * * * undertakes to exercise the right to say what interstate commerce will benefit the State and what will not, such action, with certain exceptions immaterial here, constitutes an unconstitutional violation of the commerce clause.”

While this is dictum, it is in accord with our holding herein.

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No. **104**

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

PARMELEE TRANSPORTATION CO.,

Appellant,

vs.

THE ATCHISON TOPEKA AND SANTA FE RAILWAY
CO., et al.,

Appellees.

Appeal from the United States Court of Appeals
for the Seventh Circuit

REPLY BRIEF OF PARMELEE TRANSPORTATION COMPANY.

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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1956.

No. 906

PARMELEE TRANSPORTATION CO.,

Appellant,

vs.

THE ATCHISON TOPEKA AND SANTA FE RAILWAY
CO., et al.,

Appellees.

Appeal from the United States Court of Appeals
for the Seventh Circuit

**REPLY BRIEF OF PARMELEE
TRANSPORTATION COMPANY.**

I.

APPELLANT HAS STANDING TO APPEAL.

Appellees' suggestion that appellant has no standing to appeal is without merit. The appellant is engaged in the transfer business in the City of Chicago and is licensed by the City of Chicago to engage in that business. The appellee Transfer is engaged in the transfer business in the City of Chicago but has not secured, or indeed applied for, a license from the City of Chicago to engage in that business. We submit that this establishes a right of the appellant to maintain this appeal.

has not applied for license under the ordinance. The amended ordinance must be construed as a whole. *People v. Boykin*, 298 Ill. 11, 20; 131 N. E. 133, 136 (1921). The licensing sanction permeates the whole of the regulatory scheme established by the ordinance. Thus, section 28-4 requires safety inspection before a license is issued; section 28-5 requires the filing of certain information as a prerequisite to the grant of a license; section 28-6 requires the commissioner in the exercise of the licensing function to make determinations concerning the character and financial reliability of the operator; section 28-12 requires a determination of financial responsibility; section 28-14 provides for suspension of the license of a vehicle which becomes unsafe for operation. Yet the Court of Appeals held that the City "... has no power, directly or indirectly, to designate who shall own or operate such vehicles." (Statement as to Jurisdiction, p. 28a.) According to the Court of Appeals, only the Terminal Lines may decide who shall perform terminal transfer services in the City of Chicago: "The city is not equipped to function effectively in this area. It follows that the choice as to the instrumentality to be used for that purpose properly belongs to the Terminal Lines. These facts preclude the selection of an operator of terminal vehicles by anyone other than the Terminal Lines." (Statement as to Jurisdiction, p. 27a.) This, it seems to us, is a clear enough declaration that the governmental power to determine, for example, whether the operator's character and financial responsibility are such as to assure adequate protection to the public is lodged not in the City of Chicago by the ordinance but in a group of private railroad corporations by a Federal court.

Whether the Court of Appeals meant to strike down all licensing provisions of the ordinance, or all those permitting the discretionary withholding of a license, or all

those permitting the withholding of a license on grounds relating to the identity and circumstances of the applicant, or only those contained in section 28-31.1, we do not know. It may be that the court was assuming the legislative function of striking out the "1955 amendment" and restoring the "prior ordinance." (Statement as to Jurisdiction, p. 31a.) It is not important to find the answers for present purposes. For, whatever may be the full sweep of the decision, it unquestionably and as a minimum denies to the City of Chicago the right to employ the licensing sanction, as provided in section 28-31.1, even on the basis of considerations which are not "economic" but which relate solely to public safety and welfare and to the preservation and maintenance of the city streets. That the City possesses such power and that the Court of Appeals has erroneously denied it that power is amply demonstrated in the Statement as to Jurisdiction and in the alternate Petition for Certiorari.

III.

THE INTERSTATE COMMERCE ACT DOES NOT PRECLUDE THE APPLICATION OF THE ORDINANCE TO THE ACTIVITIES OF TRANSFER.

In part 5 of the Motion to Dismiss or Affirm, the appellees frivolously suggest that appellants have conceded that section 202(c)(2) of the Interstate Commerce Act, 49 U. S. C. sec. 302(c)(2), precludes the application of the ordinance in issue to the activities of Transfer. A quick glance at the first of the Questions Presented to this Court (Statement as to Jurisdiction p. 3) demonstrates that we have properly raised this question. Appellees would require that we specifically negate in the questions presented each statement made in the lower court's opinion. No Rule of this Court requires us to do so.

1. *Transfer is specifically exempted from Part II of the Interstate Commerce Act.*

Section 202(c) of the Interstate Commerce Act provides:

“Notwithstanding any provision of this section or of section 203, the provisions of this part, except the provisions of section 204 relative to qualifications and maximum hours of service of employees and safety of operation and equipment shall not apply— * * *

(2) to transportation by motor vehicle by any person (whether as agent or under a contractual arrangement) for a common-carrier by railroad subject to Part I, . . . in the performance within terminal areas of transfer, collection, or delivery service; but such transportation shall be considered to be performed by such carrier . . . as part of, and shall be regulated in the same manner as, the transportation by railroad” (49 U. S. C. sec. 302 (c) (2).)

While this exemption from Part II does not include exemption by its terms from section 204, the Motor Carrier Safety Regulations promulgated by the Commission pursuant to Section 204 clearly preserve the city's police power exercised in the Chicago Public Passenger Vehicle Code. Regulation 190.33 (49 C.F.R. sec. 190.33) provides that the federal safety regulations, with the exception of maximum hours of employment, shall not apply to “vehicles and drivers used wholly within a municipality or the commercial zone thereof,” unless the vehicle is carrying explosives. Regulation 190.30 (49 C. F. R. sec. 190.30) goes further to assure the preservation of local control, providing:

“Except as otherwise specifically indicated, Parts 190-197 of this subchapter are not intended to preclude States or subdivisions thereof from establishing or enforcing State or local laws relating to safety, the

compliance with which would not prevent full compliance with these regulations by the persons subject thereto."

Thus, in the single area under Part II in which the federal government has exercised powers relevant to the operations of Transfer, safety and maximum hours of employment, the Interstate Commerce Commission specifically recognizes the need for local control over safety; and the Chicago Public Passenger Vehicle Code does not deal with the maximum hours of employment. Obviously there is no conflict between local and federal authority here.

2. *Transfer cannot secure a certificate of convenience and necessity from the Interstate Commerce Commission.*

The Interstate Commerce Commission has made it abundantly clear that the operations engaged in by Transfer could not be certified under Part II of the Interstate Commerce Act as a motor carrier. *Scott Bros., Inc., Collection and Delivery Service*, 4 M. C. C. 551 (1938); *Status of Parmelee Transportation Co.*, 288 I. C. C. 95 (1953); *Michigan Cab Co., Inc.*, 7 M. C. C. 701 (1938). Cf. *Cederblade v. Parmelee Transportation Co.*, 166 F. 2d 554, 555 (C.A. 7, 1948).

3. *There is no conflict between the Chicago Public Passenger Vehicle Code and the federal control exercised by the Interstate Commerce Commission under Part I of the Interstate Commerce Act.*

We need not here quarrel with the suggestion that the Interstate Commerce Commission could compel the railroads to offer interstation transfer service. The fact is that the Commerce Commission has taken no action of that sort. Indeed, not once in the three courts in which this

case has now been considered has there been any evidence of any action by the Interstate Commerce Commission relating to such service.

We respectfully submit that the judgment of the Court of Appeals should be reversed.

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1957.

No. 104

PARMELEE TRANSPORTATION CO.,
Appellant-Petitioner,

vs.

THE ATCHISON, TOPEKA AND SANTA FE
RAILWAY CO., et al.,
Appellees-Respondents.

On Appeal from and Writ of Certiorari to the United
States Court of Appeals for the Seventh Circuit

**BRIEF FOR APPELLANT-PETITIONER,
PARMELEE TRANSPORTATION CO.**

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1957.

No. 104

PARMELEE TRANSPORTATION CO.,
Appellant-Petitioner,

vs.

THE ATCHISON, TOPEKA AND SANTA FE
RAILWAY CO., et al.,
Appellees-Respondents.

On Appeal from and Writ of Certiorari to the United
States Court of Appeals for the Seventh Circuit

**BRIEF FOR APPELLANT-PETITIONER,
PARMELEE TRANSPORTATION CO.**

OPINIONS BELOW.

The opinion of the United States District Court for the Northern District of Illinois, Eastern Division, is reported at 136 F. Supp. 476. The opinion of the United States Court of Appeals for the Seventh Circuit is reported at 240 F. 2d 930.

STATUTORY BASIS FOR JURISDICTION.

The jurisdiction of this Court to review on appeal the judgment of the Court of Appeals for the Seventh Circuit is conferred by 28 U.S.C. § 1254 (2).

The judgment of the United States District Court for the Northern District of Illinois was entered on January 12, 1956. (R. 160) The judgment of the United States Court of Appeals for the Seventh Circuit, review of which is sought here, was entered on January 17, 1957. (R. 212) Petitions for rehearing were denied by the latter Court on February 20, 1957. (R. 213)

MUNICIPAL CODE OF CHICAGO CHAPTER 28.

The provisions of Chapter 28 of the Municipal Code of Chicago are set forth in the Appendix to this Brief, at pp. 1a to 18a.

QUESTIONS PRESENTED.

The following questions are presented by this appeal and petition:

1. Whether the judgment entered by the Court of Appeals in this case is appealable under 28 USC § 1254 (2)?
2. Whether the appellant-petitioner has standing to maintain this appeal and petition for certiorari?
3. Whether the Court of Appeals erred in holding that the City of Chicago could not constitutionally require the appellee-respondent, Railroad Transfer Service, Inc., a non-certificated motor carrier engaged primarily in interstate commerce wholly within the City of Chicago, to secure a license in order to use the public streets and highways within that city, where the license requirement was a means of effectuating a plan of regulation relating to traffic control, public safety, and maintenance of the streets and highways within the City of Chicago?
4. Whether the Court of Appeals erred in gratuitously anticipating a constitutional question by not requiring the

appellee-respondent, Railroad Transfer Service, Inc. to exhaust its administrative remedies by applying for a license as required by the Municipal Code of the City of Chicago, §§ 28-1 through 28-32?

5. Whether the Court of Appeals erred in imputing improper motives to the City Council of the City of Chicago in order to hold that the ordinance in question was unconstitutional as applied to the appellee-respondent, Railroad Transfer Service, Inc.?

6. Whether the Court of Appeals erred in substituting its judgment for that of the City Council of the City of Chicago with respect to whether the licensing of motor vehicles performing transfer services within the City of Chicago was an appropriate means of effectuating the police power of the City of Chicago, exercised for the purpose of controlling traffic, effecting public safety and maintaining streets and highways within the City of Chicago?

STATEMENT OF THE CASE.

This is an action brought by the appellees-respondents railroad companies and Railroad Transfer Service, Inc. (hereinafter sometimes referred to as "Transfer") for a declaratory judgment that Chapter 28 of the Municipal Code of Chicago is inapplicable to the transfer service activities carried on by the appellee Transfer in Chicago and for an injunction to prevent the officials of the City of Chicago from enforcing the ordinance. The jurisdiction of the United States district court was invoked under 28 U.S.C. §§ 1331, 1337. The United States district court held that the ordinance was applicable to the activities of Transfer in the City of Chicago and that the ordinance as so applied was constitutional. It granted appellant's motion for summary judgment to that effect. 136 F. Supp.

476. The United States Court of Appeals for the Seventh Circuit held that the ordinance was applicable to the activities of Transfer which were carried on in the City of Chicago, but ruled that the ordinance as so applied violated the Commerce Clause of the United States Constitution. Article I, Section 8, Clause 3.

The facts are not in dispute.

In the central business district of Chicago there are eight railroad passenger terminals, each of which is used by one or more of the twenty-one terminal lines serving the city. None of the terminal lines operates through the city. A through passenger (i.e., one whose journey both begins and ends at points other than Chicago) travels on an interline ticket and must change trains at Chicago. When the incoming line and the outgoing line use different terminals, arrangements have been made for the transportation of through passengers and their baggage from one terminal to another. Basically, such transportation constitutes the "terminal services" which are involved in this case, although in a broader sense "terminal services" includes also transfer between railroad terminals and steamship docks, and between terminals or docks and other points in the central business district. Ninety-nine percent of the passengers using these transfer services are traveling in interstate commerce.

The railroads have undertaken to arrange transfer services in Chicago instead of leaving it to the passenger to make his own arrangements for getting from one terminal to another. They have, at least since 1916, published tariffs permitting the inclusion of the transfer service in the fare, and the normal practice is to include in the interline ticket a coupon entitling the passenger to transfer between terminals. In modern times the only practicable means of transfer has been by motor vehicle operating on the streets

of Chicago, and the railroads have contracted with motor carriers to provide the service.

• For more than a century prior to 1955, transfer services were provided by Parmelee Transportation Company and its predecessors. *Status of Parmelee Transportation Company*, 288 I.C.C. 95 (1953). The vehicles employed have always been regarded as public passenger vehicles for hire, and have been regulated by the City of Chicago under a comprehensive scheme for the regulation of such vehicles. While Parmelee supplied the services it operated in compliance with the regulations prescribed by the City, and the validity of those regulations was not questioned.

It is important to summarize the regulatory situation as it existed in 1955.

• Chapter 28 of the Chicago Municipal Code dealt with public passenger vehicles generally, and specifically with livery vehicles, sight-seeing vehicles, taxicabs, and terminal vehicles. A terminal vehicle was defined as "a public passenger vehicle which is operated under contracts with railroad and steamship companies, exclusively for the transfer of passengers from terminal stations." (Section 28-1.) Section 28-2 prohibited the operation of any vehicle for the transportation of passengers for hire on the streets of the city unless it was licensed by the City as a public passenger vehicle.

• Section 28-4 provided that no vehicle should be licensed until, after inspection by the public vehicle license commissioner, it had been found to be in safe operating condition and to have adequate body and seating facilities.

Section 28-4.1 conditioned the license on compliance with further specifications for safety, relating to the adequacy of doors and aisle space.

Section 28-5 required the application for a license to be in writing and to give certain information concerning the applicant and the vehicle to be licensed.

Section 28-6 required the commissioner to investigate the "character and reputation of the applicant as a law abiding citizen; the financial ability of the applicant to render safe and comfortable transportation service, to maintain or replace the equipment for such service and to pay all judgments and awards which may be rendered for any cause arising out of the operation" of the vehicle.

Section 28-7 imposed an annual license fee.

Section 28-12 required proprietors of public passenger vehicles to carry public liability and property damage insurance and workmen's compensation insurance, with solvent and responsible insurers approved by the commissioner. The amount of insurance to be carried and certain provisions of the policy were specified. Policies were required to be filed with the commissioner, and provision was made for the filing of an acceptable surety bond in lieu of insurance.

Section 28-13 required the payment of all judgments arising from operation of the vehicle to be paid within 90 days, irrespective of indemnity from insurance.

Section 28-14 provided for suspension of the license if, in the judgment of the commissioner, a vehicle was found unfit for use.

Section 28-15 specified various grounds for license revocation.

Section 28-31 provided:

"No person shall be qualified for a terminal vehicle license unless he has a contract with one or more railroad or steamship companies for the transportation of their passengers from terminal stations.

"It is unlawful to operate a terminal vehicle for the transportation of passengers for hire except for their transfer from terminal stations to destinations in [the central business district]."

Section 28-32 provided fines for the violation of any provision for which another penalty was not specified, and declared that each day of continuance of a violation should be a separate offense.

On June 13, 1955, the railroads notified Parmelee of their decision to terminate its contract for the furnishing of transfer services effective September 30, 1955. The railroads entered into a new contract for the supply of these services with Transfer, a corporation organized for the purpose.

On July 26, 1955, the City Council amended Chapter 28 of the Municipal Code and effected certain changes in the provisions relating to terminal vehicles. The amendment was in three parts:

(1) The definition of "terminal vehicle" in Section 28-1 was broadened so as to eliminate the reference to contracts with railroad and steamship companies.

(2) Section 28-31 was amended to drop the requirement that, to be eligible for a terminal vehicle license, a person must have a contract with one or more railroad or steamship companies.

(3) A new section (28-31.1) was added. Its importance in this action requires that it be set out in full:

"28-31.1. Public Convenience and Necessity. No license for any terminal vehicle shall be issued except in the annual renewal of such license or upon transfer to permit replacement of a vehicle for that licensed unless, after a public hearing held in the same manner as specified for hearings in Section 28-22.1, the commissioner shall report to the council that public con-

venience and necessity require additional terminal vehicle service and shall recommend the number of such vehicle licenses which may be issued.

"In determining whether public convenience and necessity require additional terminal vehicle service due consideration shall be given to the following:

- "1. The public demand for such service;
 - "2. The effect of an increase in the number of such vehicles on the safety of existing vehicular and pedestrian traffic in the area of their operation;
 - "3. The effect of an increase in the number of such vehicles upon the ability of the licensee to continue rendering the required service at reasonable fares and charges to provide revenue sufficient to pay for all costs of such service, including fair and equitable wages and compensation for licensee's employees and a fair return on the investment in property devoted to such service;
 - "4. Any other facts which the commissioner may deem relevant.
- "If the commissioner shall report that public convenience and necessity require additional terminal vehicle service, the council, by ordinance, may fix the maximum number of terminal vehicle licenses to be issued not to exceed the number recommended by the commissioner."

Transfer began operations, under its contract with the railroads in October, 1955, but never applied for public passenger vehicle licenses as required by Chapter 28 of the Municipal Code. On the contrary, it took the position that the ordinance did not apply to its operations under its contract with the railroads, and that, if the ordinance did apply to such operations, it was void as an attempt to regulate interstate commerce. The City having indicated its intention to enforce the ordinance against Trans-

fer, the railroads and Transfer on October 24, 1955, filed their complaint against the City and its officials in the United States District Court for the Northern District of Illinois, seeking an injunction and a declaration that the ordinance was inapplicable or, in the alternative, that the ordinance was void as applied to the plaintiffs. Jurisdiction was invoked under Section 1331 of the Judicial Code, the requisite jurisdictional amount being in controversy, and under Section 1337.

On November 10, 1955, the district court entered an order permitting Parmelee to intervene as a defendant under the provisions of Rule 24 (b), Federal Rules of Civil Procedure.

On November 17, 1955, the City moved for summary judgment and on January 12, 1956, the court, finding no genuine issue of fact involved, entered its order of summary judgment in favor of the defendants and dismissed the action. The court had filed a memorandum opinion on December 12, 1955. On January 12, 1956, concurrently with its judgment order, the court filed a supplemental memorandum together with findings of fact and conclusions of law. The court held that the ordinance was applicable to Transfer, and that it was a proper exercise of police power by the City in the interest of public safety, health and welfare.

On January 13, 1956, the plaintiffs gave notice of appeal. On January 17, 1957, the United States Court of Appeals for the Seventh Circuit filed its opinion and order reversing the judgment of the district court and remanding the cause for further proceedings. The decision of the Court of Appeals was rested squarely on the invalidity of the ordinance under the Federal Constitution and laws.

On February 20, 1957, the Court of Appeals denied petitions for rehearing filed by the City and Parmelee, respectively.

On May 27, 1957, this Court entered an order postponing the question of jurisdiction to the hearing of the case on the merits and inviting argument on the questions: 1) whether Parmelee "has standing to seek review here on appeal or by writ of certiorari"; and 2) "Whether the judgment of the Court of Appeals is 'final' so as to permit review by way of appeal under 28 U.S.C. § 1254 (2)." 353 U.S. 971.

SUMMARY OF ARGUMENT.

1. The judgment of the court of appeals is an appealable order pursuant to § 1254 (2). This Court was in error in the *Slaker* case in holding that the "final judgment" rule was applicable to appeals under this section. *Slaker v. O'Connor*, 278 U.S. 188 (1929). Neither the language of the statute, its history, its purpose, nor the policy of limiting the business of this Court supports such a decision.

In any event, the judgment of the court of appeals in this case was a final order. Nothing remains to be done in this litigation except for the entry of judgment in the district court on the basis of the court of appeals' opinion. The motion for summary judgment in the district court effectively eliminated any questions of fact. All legal issues between the parties have been resolved.

2. Parmelee's standing to maintain this appeal is established by *Frost v. Corporation Commission*, 278 U.S. 515 (1929). Parmelee is a licensed transfer service seeking to prevent unlawful competition by Transfer. Transfer's competition is unlawful because of its failure to secure a license from the City of Chicago. The decisions of this Court since the *Frost* case recognize its continued vitality.

3. We concede that the City of Chicago has no power to impose economic regulations on a carrier engaged in

interstate commerce as a condition for granting a license. We concede, too, that the City of Chicago is without authority to require a license as a condition to operations by any carrier certificated by the Interstate Commerce Commission. But the license requirements imposed on Transfer do not involve economic regulation and Transfer is not, and can not be, a certificated carrier. The instant case is on all fours with *Columbia Terminals Co. v. Lambert*, 30 F. Supp. 28 (1939), aff'd on appeal, 309 U.S. 620 (1940). The ruling in the *Columbia Terminals* case is in accord with all the recent decisions of this Court to the effect that a state does have power to impose a license requirement on a non-certificated carrier in interstate commerce in furtherance of its exercise of police powers with regard to matters not covered by federal law or regulation. In the instant case, the activities of Transfer are not subject to any existent I.C.C. regulations which would conflict with the requirements imposed by the City of Chicago. In fact, the I.C.C. regulations specifically leave to local authorities the regulation of matters covered by the City ordinance in question here. The ordinance is, therefore, valid and enforceable.

4. Transfer is not entitled to attack the validity of the ordinance without first having applied for a license. Until the City has acted on the application for a license there is no basis for urging, as Transfer does, that the license would be denied on unconstitutional grounds. In rejecting the interpretation of the ordinance by the city officials that economic conditions would not be imposed on Transfer under the ordinance and in presuming that the ordinance would be unconstitutionally applied, the court of appeals judgment is in conflict with the decisions of this Court.

5. By failing to make application for a license, Transfer asked the federal courts to decide a constitutional issue

which need never have arisen, except for the failure of Transfer to exhaust its administrative remedies.

6. The court of appeals erroneously imputed improper motives to the City Council of Chicago in passing the ordinance in question and on the basis of that imputation held the ordinance invalid. This Court has held since *Fletcher v. Peck*, 6 Cranch 87, that the validity of state legislation may not be determined on the basis of the motives of legislators.

7. In taking the position that no governmental control over the number of terminal vehicles in operation in the City of Chicago was necessary in order to avoid traffic congestion, protect the safety of the public, and preserve the streets of the City, and that the license was not a necessary sanction for the implementation of the city's legitimate police powers, the court of appeals assumed to substitute its judgment for that of the City Council. This it cannot do consistently with the mandates of this Court.

ARGUMENT.

I.

THE JUDGMENT ENTERED BY THE COURT OF APPEALS IN THE INSTANT CASE IS APPEALABLE UNDER 28 U.S.C. § 1254(2).

A. A final judgment should not be a jurisdictional prerequisite to an appeal from a judgment of a United States Court of Appeals in a case in which that court has held a state statute in violation of a provision of the federal constitution.

It is respectfully submitted that this Court has heretofore been mistaken in reading into 28 U.S.C. § 1254(?) and its predecessor a requirement of finality for review of a court of appeals judgment holding a state statute invalid because in conflict with a provision of the federal Constitution. *Slaker v. O'Connor*, 278 U.S. 188 (1929); *South Carolina Electric and Gas Co. v. Flemming*, 351 U.S. 901 (1956). We seek the Court's indulgence and permission to argue this question for two reasons. First, the only case in which this Court has expressed its view on this subject since the passage of the 1925 Judiciary Act, 43 Stat. 936, 68th Cong, 2d Sess. (1925), is the *Slaker* case. The issue was not, however, presented by that case, for, as this Court stated: "The petition contained three counts none of which questioned the validity of the statute." 278 U.S. at 189. An attempt to appeal under the predecessor of § 1254(2), therefore, was wholly unwarranted and indeed, as the Court held, frivolous. Cf. Moore's Commentary on the U. S. Judicial Code, 552, 554 (1949): The issue raised here was certainly not presented to the Court by the facts of that case. Second, neither in the *Slaker* case nor in the *Flemming* case, the only other

instance in which the doctrine of finality was specifically invoked by this Court, did counsel have an opportunity to brief the question and present arguments to the Court.

The immediate predecessor of § 1254(2), with which this Court was concerned in the *Slaker* case, was the amendment to § 240(b) effected by the Judiciary Act of 1925. (We go no further back in the history of this section for the reason that this Court's jurisdiction was thoroughly revised by the 1925 Act and the distinction between its discretionary jurisdiction on certiorari and its compulsory jurisdiction on appeal was made of primary importance by this Act.) The 1925 Act provided that:

Any case in a circuit court of appeals where is drawn in question the validity of a statute of any State, on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, and the decision is against its validity, may, at the election of the party relying on such State statute, be taken to the Supreme Court for review on writ of error or appeal; . . . (43 Stat. 936, 939).

There was no mention therein of a qualification of finality, even though § 240(b) was added in the course of debate in the Senate and was inserted to parallel the provision for appeal from judgments of State courts holding unconstitutional a federal treaty or statute, which provision did contain a final judgment requirement. See *Frankfurter and Landis, The Business of the Supreme Court*, 276-78 (1927). Indeed, the very first words of the section on which § 240(b) was patterned make the finality of the judgment a prerequisite to review. The relevant portions of that section read as follows:

A final judgment or decree in any suit in the highest court of a State in which a decision in the suit could be had, where is drawn in question the validity of a

treaty or statute of the United States, and the decision is against its validity; . . . may be reviewed by the Supreme Court on a writ of error. (43 Stat. 936, 937.)

Thus, there can be no doubt that the legislators were cognizant of the final-judgment requirement and knowingly omitted it from the amended § 240(b). The only rational conclusion to be drawn from this legislative history is that a final judgment was not made a prerequisite to review under § 240(b).

When Congress recodified the Judicial Code in 1948, once again the right of appeal from state courts was specifically made dependent on the existence of a final judgment. 28 U.S.C. § 1257. But no such qualification was attached to appeals taken pursuant to § 1254(2):

In the Congressional scheme for review of decisions of courts of appeals by this Court—and it is to be remembered that the Constitution charges Congress with the duty to regulate this Court's appellate jurisdiction—Congress has nowhere imposed a final-judgment requirement. See 28 U.S.C. § 1254(1) (certiorari); § 1254(3) (certificate); § 1252 (appeals from judgments holding federal statutes unconstitutional). And in no other instance has this Court read such a requirement into the statute. It is respectfully submitted that there is no reason why such a qualification should be read into § 1254 (2).

The very same policy underlying review as a matter of right by this Court of decisions adverse to the constitutionality of a federal statute—a review which is not qualified by a final-judgment rule—underlies the grant of review as a matter of right in § 1254(2) cases. Indeed, the necessity for operating the federal system with as little conflict as possible between the states and the nation would suggest that Supreme Court intervention is more

readily required in § 1254(2) cases than in those instances in which a federal court has ruled against the validity of a federal statute.

The only policy argument against review of non-final orders in these cases must be premised on the necessity for husbanding the energies of this Court, an argument which would apply to all classes of cases which this Court is authorized to review. This argument falls when it is recognized that in the thirty-odd years since the 1925 Judiciary Act, there have been very few appeals to this Court under § 1254(2). See *Robertson and Kirkham, Jurisdiction of the Supreme Court of the United States*, 221 (1951 ed.). And in those instances in which an appeal is sought on the basis of a frivolous argument, this Court is adequately armed to protect itself through the device of a summary affirmance.

We respectfully submit, therefore, that the requirement of finality, read into the statute by the dictum in the *Slaker* opinion, finds no basis in the language of the statute, the purpose of the statute, the Congressional scheme for review of decisions of courts of appeals by this Court, or the policy of limiting the business of the Court, and should, therefore, now be corrected.

B. The judgment below was "final" for purposes of an appeal under 28 U.S.C. § 1254(2).

In the event that the Court chooses to adhere to its requirement of a final judgment as a prerequisite to an appeal pursuant to § 1254(2), we submit that the judgment of the Court of Appeals for the Seventh Circuit was "final" within the requirements of the statute as interpreted by this Court.

As this Court has stated, "no self-imposing formula defining when a judgment is 'final' can be devised." *Re-*

public *Natural Gas Co. v. Oklahoma*, 334 U.S. 62, 67-68 (1948). In effect, however, this Court has ruled, under § 1257 and its predecessor, on which § 1254(2) is based, *Frankfurter and Landis, supra*, that a judgment or decree, in order to qualify as final, "must terminate the litigation between the parties on the merits of the case, so that, if there should be an affirmance here [in this Court], the court below would have nothing to do but to execute the judgment or decree it had already rendered." *Georgia Ry. and Power Co. v. Decatur*, 262 U.S. 432, 437 (1923); see also *Gospel Army v. Los Angeles*, 331 U.S. 543, 546 (1947). This requirement is met by the case at bar.

This case was instituted as an action for a declaratory judgment that the ordinance in question was inapplicable to the services rendered by Transfer, or, if applicable, was unconstitutional; and an injunction was sought to prevent the enforcement of the ordinance against Transfer by the officials of the City of Chicago. The accuracy of the relevant facts stated in the complaint was conceded, and the City moved for summary judgment on the issues raised. The United States District Court for the Northern District of Illinois held that the ordinance was applicable to the activities of Transfer and that it was constitutional as applied to those activities. 136 F.Supp. 476. This was a final judgment disposing of all of the issues raised by the case. On appeal to the Court of Appeals for the Seventh Circuit that Court held that the ordinance was applicable to the activities of Transfer but as so applied was unconstitutional. 240 F.2d 930. Once again, the judgment disposed of all the issues in the case and left nothing to be done by the District Court except to enter judgment for the plaintiffs in conformity with the judgment and opinion of the Court of Appeals.

Presumably, the doubts as to the finality of the judgment which prompted this Court to raise the question grow out of this Court's ruling in *Fountain v. Filson*, 336 U.S. 681 (1949). In that case, the district court had granted defendant's motion for summary judgment which rested on a defense "that New Jersey law would not permit the imposition of a resulting trust under the circumstances disclosed in the complaint and the accompanying documents." *Id.* at 682. On appeal the court of appeals "agreed that under New Jersey law no resulting trust could arise . . ." *Ibid.* But it held also that, since the complaint contained a prayer for "general relief" and alleged facts on which recovery could be had other than on the basis of a resulting trust, defendant was not entitled to summary judgment. Without giving defendant an opportunity to litigate the issues of fact relevant to this second basis for recovery, the court of appeals ordered the district court to enter judgment for the plaintiff. The defendant made a "timely motion" before the court of appeals "for a modification of this order in order to permit a trial as to the existence of the personal obligation" on a basis other than a resulting trust. *Ibid.* That motion was denied. This Court reversed the decision of the court of appeals, holding that the defendant had a right to contest those factual issues which were not conceded by the motion for summary judgment.

In short, this Court said that where the complaint alleged two grounds for recovery and the motion for summary judgment was granted only as to one, the moving party retains the right to litigate the factual issues involved in the second ground asserted. This Court specifically reserved the question in effect raised by the case at bar: "We need not pass on the propriety of an order for summary judgment by a district court in favor of one party after the opposite party has moved for summary

judgment in its favor, where it appears that there is no dispute as to any fact material to the issue being litigated." *Id.* at 682-83.

In the case at bar, the motion for summary judgment covered all the issues which could be contested by the parties, *i.e.*, the question whether the ordinance was applicable to the activities of Transfer and, if applicable, whether the ordinance was constitutional. "... there is no dispute as to any fact material to the issue[s] being disputed." Both issues were resolved by both courts below. Parmelee knows of no other issues in contest between the parties. If this Court were to hold, in these circumstances, that the judgment of the court of appeals is not final, it would remain only for the case to be remanded to the district court, which could do nothing but enter a judgment for the plaintiffs in accordance with the judgment and opinion of the court of appeals. After the entry of such a judgment, an appeal could be taken to the court of appeals, which would be compelled by its previous decision to affirm the judgment thus entered. At that time Parmelee would be able to take an appeal to this Court under § 1254(2) without any question about the finality of the judgment of the court of appeals. Cf. *United States v. United States Gypsum Co.*, 340 U.S. 76 (1950).

It is difficult for us to believe that a final-judgment rule, the justification for which must be the husbanding of the resources of the federal judicial system, could contemplate such a profligate waste of time, money, and effort, not only on the part of the litigants, but on the part of all three levels of the federal judiciary. A final-judgment rule must rest on the proposition that this Court will not "review by piecemeal the action of a . . . court which otherwise would be within its jurisdiction," *Louis-*

ana Navigation Co. v. Oyster Commission of Louisiana, 226 U.S. 99, 101 (1912), and on the proposition that this Court will not undertake to review a question which might be mooted by further action in the lower courts. This rationalization establishes the decision of the court of appeals in this case as a final judgment, for all questions which the lower courts will be called upon to resolve have been resolved, and nothing remains but the formality of entry of judgment.

Thus, this case is easily distinguishable from those cited by the Court in its order raising this jurisdictional question. In both *Slaker* and *Flemming*, the judgments of the courts of appeals required that the case be tried on its merits by the respective district courts. No such trial would result from the judgment of the court of appeals entered in the instant case. Nothing remains here for the district court but the entry of a judgment on the basis of the court of appeals' opinion. The judgment of the court of appeals thus qualifies as a final judgment for purposes of review by this Court pursuant to § 1254(2). In the event of an "affirmance [by this Court], the court below would have nothing to do but to execute the judgment or decree it had already rendered," *Georgia Ry. and Power Co. v. Decatur*, *supra*.

In similar situations, this Court has held that a judgment of the court below was final for purposes of review here. *Pope v. Atlantic Coast Line R. Co.*, 345 U.S. 379 (1953) (judgment reversing dismissal of the complaint held final where defendant conceded that no other defense could be made); cf. *Richfield Oil Corp. v. State Board of Equalization*, 329 U.S. 69 (1946). This case should receive similar treatment.

II.

PARMELEE HAS STANDING TO SECURE REVIEW OF THE COURT OF APPEALS' JUDGMENT BY THIS COURT BOTH ON APPEAL AND ON CERTIORARI.

The question of Parmelee's standing to maintain its appeal and petition for certiorari, like many important questions of federal jurisdiction, is one which turns largely on the "specific circumstances of individual situations." *Chapman v. Federal Power Commission*, 345 U.S. 153, 156 (1953). We start with the proposition that the case at bar is within the rule established by the decision in *Frost v. Corporation Commission*, 278 U.S. 515 (1929), except that some of the weaknesses inherent in the appellant's position in *Frost* are not present in this case.

In this case, as in *Frost*, the local authority declared the business in question (here a transfer service, in *Frost* cotton ginning) to be one which can be conducted only by those who have secured a license. Here, as in *Frost*, the appellant secured the necessary license, its competitor failed to secure a license. Here, as in *Frost*, appellant's interest is in carrying on its business without illegal competition from an un-licensed competitor. Here, as in *Frost*, the appellant is not suggesting that it is entitled to be free of competition or entitled to a monopoly, but only that others engaged in the same business comply with the same valid licensing requirements as those imposed on appellant. "Appellant, having complied with all the provisions of the statute, acquired a right to operate a gin in the city of Durant by valid grant from the state acting through the corporation commission. While the right thus acquired does not preclude the state from making similar valid grants to others, it is nevertheless, exclusive against any person attempting to operate a gin without obtaining a permit or, what amounts to the same thing, against one who attempts to

do so under a void permit; in either of which events the owner may resort to a court of equity to restrain the illegal operation upon the ground that such operation is an injurious invasion of his property rights The injury threatened by such an invasion is the impairment of the owner's business, for which there is no adequate remedy at law." 278 U.S. at 521.

The difference between this case and the *Frost* case is that in the latter the Court held that the appellant's economic interests were adequate to confer standing to maintain the action despite the fact that the appellant was *attacking* an amendment to the statute as *invalid* under the federal Constitution. In the case at bar, the economic interest of the appellant in protecting itself against unlicensed competition is asserted in *support* of rather than in *derogation* of the statutory amendment in question. The importance of this difference is emphasized by the fact that none of the arguments urged by the dissenters against appellant's standing to sue in the *Frost* case can be urged against the appellant-petitioner in this case.

In a similar situation in which this Court was called upon to determine whether a common carrier in competition with other common carriers was "a party in interest" within the meaning of § 205(h) of the Motor Carrier Act, this Court in *Alton R. Co. v. United States*, 315 U.S. 15, 18-20 (1942) said:

"We are met at the outset with the question of the standing of the appellant railroad companies (seventy-one in number) to bring and maintain the suit in the District Court. All but a few intervened in the hearing before the Commission. Each is a common carrier and a competitor of Fleming in some portion of the territory which Fleming is authorized to serve We do not stop to inquire what effect,

if any, the status of appellant railroad companies as intervenors before the Commission had on their right to bring and maintain this suit . . . They clearly have a stake as carriers in the transportation situation which the order of the Commission affected. They are competitors of Fleming for automobile traffic in territory served by him. They are transportation agencies directly affected by competition with the motor transport industry—competition which prior to the Motor Carrier Act of 1935 had proved destructive . . . They are members of the national transportation system which that Act was designed to coordinate . . . Hence they are parties in interest within the meaning of § 205(h) under the tests announced in [opinions of this Court].”

We submit that there can be no question about the interest of the appellant in avoiding competition by an unlicensed carrier as one which gives it a right to maintain this appeal. It is the same economic interest as that asserted by the appellant in *Frost* and by the railroads in *Alton*. And we point out that the right to maintain the action in those cases was sustained despite the fact that in both, the interested parties were attacking rather than defending governmental action. Cf. *Bacardi Corp. v. Domenech*, 311 U.S. 150, 166-67 (1940).

In none of its subsequent cases has this Court cast any doubts on the continued validity of the *Frost* rule. In *Alabama Power Co. v. Ickes*, 302 U.S. 464, 484-5 (1938), the Court said that “The difference between the *Frost* case and this is fundamental; for the competition contemplated there was unlawful while that of the municipalities contemplated here is entirely lawful.” In *Tennessee Power Co. v. T.V.A.*, 306 U.S. 118, 143 (1939), the Court offered a different distinction: “The appellants may not raise any question of discrimination forbidden by the Fourteenth Amendment involved in state exemption

of the Authority from commission regulation. For this reason *Frost* . . . on which they rely, is inapplicable. Manifestly there can be no challenge of the validity of state action in this suit." In speaking of these two cases in his concurring opinion in *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123, 153 (1951), Mr. Justice Frankfurter wrote:

"The common law does not recognize an interest in freedom from honest competition; a court will give protection from competition by the Government, therefore, only when the Constitution or a statute creates such a right."

In the instant case we are seeking freedom not from "honest competition" but from competition which has failed and refused to comply with the applicable ordinances of the City of Chicago. But more important for purposes of the relevance of these cases, 1) we are not seeking protection from competition by the Government, and 2) we are relying on the rights given by the ordinance of the City of Chicago which limits those who may engage in the transfer business in the City of Chicago to those who have properly secured licenses from the City to do so.

The principal cases cited by appellees-respondents for the proposition that appellant-petitioner is without standing to maintain this appeal are irrelevant. *Perkins v. Lukens Steel Co.*, 310 U.S. 113 (1940), stands for a proposition with which we have no quarrel: "It is by now clear that neither damage nor loss of income in consequence of the action of Government, which is not an invasion of recognized legal rights, is in itself a source of legal rights in the absence of constitutional legislation recognizing it as such." (310 U.S. at 125) We repeat that we do not assert a standing to challenge action by

the Government; what we are asserting is standing to protect ourselves against action by a private corporation which is in violation of state law. Again, in *Tennessee Power Co. v. T.V.A.*, 306 U.S. 118 (1939), the principle asserted was: "... that the damage consequent on competition, otherwise lawful, is in such circumstances *damnum absque injuria*, and will not support a cause of action or a right to sue." (306 U.S. at 140.) Our case involves competition by Transfer which is otherwise unlawful in that it is being conducted in violation of the laws of the City of Chicago. And as we have already pointed out, the Court in the *Tennessee Power* case clearly distinguished the ruling therein from that in the *Frost* case. Moreover, we think that the characterization of the case given by Professors Hart and Wechsler reveals the underlying reason for denying standing there: "The Court, two justices dissenting, held that the companies were without standing to attack the constitutionality of the act." *The Federal Courts and the Federal System*, 163-64 (1953). Here, of course, we assert no right to attack the constitutionality of any federal or state statute but rather assert our rights under a state statute whose validity is being attacked by our competitors.

Similarly, *Alabama Power Co. v. Ickes*, 302 U.S. 464 (1938) and *New Orleans, M. and T. R. Co. v. Ellerman*, 105 U.S. 166 (1882), are consistent with the position which we take. In the former, the Court stated the essential question: "What petitioner anticipates, we emphasize, is damage to something it does not possess—namely, a right to be immune from lawful municipal competition. No other claim of right is involved." (302 U.S. at 480.) We repeat that we assert no right to immunity from lawful competition, but only a right to immunity from unlawful competition—competition carried on in violation of state law. In the *Ellerman* case, the Court said: "The damage

is attributable to the competition, and to that alone. But the competition is not illegal. It is not unlawful for any one to compete with the company, although the latter may not be authorized to engage in the same business. The legal interest which qualifies a complainant other than the State itself to sue in such a case is a pecuniary interest in preventing the defendant from doing an act where the injury alleged flows from its quality and character as a breach of some legal or equitable duty." (105 U.S. at 173-74.) We assert that we do have the qualifying "legal interest" in this case because the action of the appellees-respondents is "a breach of some legal duty," the legal duty not to engage in transfer service within the City of Chicago without first obtaining a license. And we point out once again that the Court was clear in distinguishing the problem in the *Alabama Power* case from the *Frost* ruling. 302 U.S. at 484. "We held [in *Frost*] that . . . while the acquisition of the franchise did not preclude the state from making similar valid grants to others, it was exclusive as against an attempt to operate a competing gin without a permit or under a void permit."

The case of *Ex parte Levitt*, 302 U.S. 633 (1937) is, of course, inapposite, for we are not asserting the rights of a citizen without special interest but the rights of a competitor to be free from unlawful competition. The case of the *City of Chicago v. Chicago Rapid Transit Co.*, 284 U.S. 577 (1931) is also irrelevant, since it rests on the principle that a municipality is foreclosed from attacking the constitutionality of a law of the State in which the municipality is incorporated. *Pawhuska v. Pawhuska Oil Co.*, 250 U.S. 394 (1919).

The last weak reed on which appellees-respondents rely in their attempt to distinguish the *Frost* case is one of

language without substance. They assert that the *Frost* case involved a "franchise" while this case involves only a "license." As Judge Biggs said in *Seatrain Lines v. United States*, 64 F. Supp. 156, 160 (D. Del., 1946), "Whether the certificate when issued be called a 'franchise' or not is relatively unimportant. Whatever be its proper name, it is a creature of the statute."

We respectfully submit that the standing of the appellant-petitioner to maintain this action is well grounded in the doctrine of the *Frost* case, a precedent whose vitality is attested by the very decisions cited by the appellees-respondents in opposition to our right to maintain this appeal and petition for certiorari.

III.

THE CITY MAY REQUIRE A LICENSE AS A MEANS OF EFFECTUATING ITS LEGITIMATE INTEREST IN REGULATING PUBLIC PASSENGER VEHICLES FOR HIRE, WHERE THE CARRIER DOES NOT HOLD A FEDERAL CERTIFICATE OF CONVENIENCE AND NECESSITY, ALTHOUGH THE CARRIER IS ENGAGED PRIMARILY IN INTERSTATE COMMERCE.

The Court of Appeals has stricken down the City's plan for regulating terminal vehicles in the interest of public safety and welfare, leaving this important branch of the public transportation of passengers for hire within the City unregulated by any governmental agency.

Essentially, the Court of Appeals' decision is based on the proposition that no state authority may require a license as a condition of the right to carry on an interstate business. This Court has repeatedly held otherwise.

Our precise position must be made clear at the outset. Throughout the course of this litigation the City and Parmelee have consistently urged upon the courts a modest

but clear conception of the City's power to regulate the transfer services involved, expressly conceding the established limitations on that power. To quote from their brief in the Court of Appeals (pp. 10, 11):

"1. We *concede* that the city may not withhold a license to carry on interstate transfer operations solely or even primarily on the ground that existing facilities are adequate, or that additional operations will adversely affect the competitive situation, or other such 'economic' grounds. *Buck v. Kuykendall*, 267 U.S. 307 (1925).

"2. We *concede* that the city may not, even in the enforcement of its lawful police regulations, withdraw the privilege of carrying on interstate transportation from a motor carrier holding a certificate of convenience and necessity issued by the Interstate Commerce Commission. *Castle v. Hayes Freight Lines, Inc.*, 348 U. S. 61 (1954)."

Railroad Transfer Service, Inc., does not hold a certificate of convenience and necessity from the Interstate Commerce Commission, and cannot obtain one. Its operations are not within the coverage of Part II of the Interstate Commerce Act, which regulates motor carriers and it is not a "carrier" under Part I of that Act. *Status of Parmelee Transportation Co.*, 288 I.C.C. 95, 104 (1953). While, therefore, the City may not condition Transfer's right to carry on its interstate operations upon a determination by the City that such operations are necessary and in the public interest in economic terms, the City has the right to impose reasonable regulations in the interest of public safety and welfare, and in the interest of conserving the public streets, and to require a license in aid of such a regulatory plan. The decisions of this Court so hold. The Court of Appeals ignored the distinctions which were so carefully made, and relied upon the inapposite

decisions in *Buck v. Kuykendall* and *Castle v. Hayes Freight Lines, Inc.* to support its decision.

This Court's most recent decision in point is *Fry Roofing Co. v. Wood*, 344 U. S. 157 (1952). A Tennessee manufacturer was transporting his goods to Arkansas by truck under an arrangement which was found to make the owner-drivers of the trucks contract carriers. The truckers had no permit or certificate from either the state or the Interstate Commerce Commission. Arkansas law required such carriers to obtain a permit, or "Certificate of Necessity and Convenience." The truckers sued to enjoin enforcement of the requirement, and the Arkansas Supreme Court dismissed the action. This Court affirmed. Four members of the Court, reading the statute as a regulation of interstate commerce indistinguishable from the Washington statute which was invalidated in *Buck v. Kuykendall*, dissented. The majority, however, accepting the interpretation placed upon the statute by state authorities, upheld the right of the state, by requiring a "permit," to require registration in order that the state might properly apply its valid police, welfare, and safety regulations to motor carriers using its highways.

Concededly, the Chicago ordinance here in question involves more than a mere requirement of registration. It includes a registration requirement, and in other ways employs the licensing device in aid of valid regulations designed to promote public safety and welfare. As construed by the District Court and conceded by the City, it does not reserve to the City or its officials any discretionary power to deny a license on grounds such as those which were proscribed in *Buck v. Kuykendall*. The fact that the permit in the *Fry* case served only to insure a registration is not the significant factor in that case. What is significant is that the Court, following its previous decisions, there re-

affirmed the power of the state to employ licensing as a sanction in aid of valid police regulations as applied to non-certificated carriers.

More significant than the holding of the *Fry* case itself is its reaffirmation of this Court's decision in *Columbia Terminals Co. v. Lambert*, 30 F. Supp. 28 (1939), decided by this Court on appeal 309 U.S. 620 (1940). This case is indistinguishable from the case at bar, and unequivocally sustains the power of the state to employ licensing in aid of valid police regulation of non-certificated carriers.

A number of railroads having their eastern termini in St. Louis, Missouri, contracted with Columbia Terminals for the transportation of incoming through freight by motor truck across the Mississippi River to East St. Louis, Illinois. The freight was then carried to its destination by roads having their western termini at that point. Columbia was thus engaged in terminal transfer operations in all material respects identical with the operations of Transfer in this case. Its operations constituted a link in the chain of interstate commerce as clearly as do those of Transfer in this case. A Missouri statute required motor carriers to obtain a permit, to carry insurance, and to observe certain safety regulations. Columbia did not apply for a state permit. It did apply for a federal permit, but the Interstate Commerce Commission held, as it has held with respect to the transfer operations in this case, that the service was not subject to federal regulation under the Motor Carrier Act. When the state took steps to enforce the licensing requirement, Columbia sued for an injunction in a three-judge court. In a careful opinion, reviewing the pertinent decisions of this Court, the district court recognized that, under *Buck v. Kuykendall* and similar cases, the commerce clause is violated

when a state "undertakes to exercise the right to say what interstate commerce will benefit the State and what will not." (30 F. Supp. at 32.) It held, however, that reasonable police regulations are not an unlawful burden upon interstate commerce and are justified so long as Congress has not occupied the field. (30 F. Supp. at 31.) So holding, the district court dismissed the bill for want of jurisdiction, because of the absence of a substantial federal question.

While the case was disposed of by a memorandum *Per Curiam* in this Court, it is apparent that the Court's disposition was a carefully considered one. The Court's order was: "The decree is vacated and the cause is remanded to the District Court with directions to dismiss on the merits." (309 U.S. 620.) In other words, the Court, while regarding the contentions made by Columbia as sufficiently substantial to support the jurisdiction of a three-judge court, unanimously agreed that the district court had rightly rejected those contentions on the merits, and had rightly upheld the validity of the state regulatory law.

The holding in *Columbia Terminals* was again approved in the *Fry* case, which contains this Court's authoritative construction of that holding. The majority in the *Fry* case said:

"In *Columbia Terminals Co. v. Lambert*, 30 F. Supp. 28, the District Court upheld a Missouri statute reading: 'It is hereby declared unlawful for any motor carriers . . . to use any of the public highways of this state for the transportation of persons or property, or both, in interstate commerce without first having obtained from the commission a permit so to do. . . .' *Buck v. Kuykendall*, 267 U. S. 307, was held not to require the statutes' invalidation, since Missouri had not refused to grant a permit on the ground that the

state had power to say what interstate commerce would benefit the state and what would not. Agreeing with this constitutional holding, we ordered the complaint dismissed." (344 U. S. 157, 162, note 5.)

The minority in the *Fry* case also referred to *Columbia Terminals*:

"*Columbia Terminals Co. v. Lambert*, 30 F. Supp. 28, whose ruling we sustained, 309 U. S. 620, is not in point. The Interstate Commerce Commission had ruled in that case that the particular operations there involved were not covered by the Federal Act. See 36 F. Supp., at 30." (344 U. S. 157, 166, note 3.)

Thus, while four members of the Court were of opinion that the doctrine of *Columbia Terminals* did not apply to a noncertificated carrier subject to the Motor Carrier Act, all members of the Court reaffirmed the doctrine of that case and its application to carriers *not subject* to the act. We reiterate that the Interstate Commerce Commission has held that the terminal transfer services engaged in by Transfer are not subject to regulation under Part II of the Interstate Commerce Act, covering motor carriers, just as it held that Columbia's terminal transfer services were not subject to regulation under the Motor Carrier Act.

The teaching of the cases is clear. No state or city can withhold a permit to engage in interstate motor transportation on the ground that the state has power to say what interstate commerce will benefit the state and what will not—i.e., to deny a permit on "economic" grounds. But where a carrier does not hold a certificate from the Interstate Commerce Commission—or, at least, where the carrier is not subject to regulation as a motor carrier by the Commission—a state can employ licensing as a sanction for valid regulatory measures designed for the promotion of public safety and welfare.

The decision of the Court of Appeals is also in conflict with the following cases, which are to the same effect:

(1) *Eichholz v. Public Service Comm'n*, 306 U.S. 268 (1939) (upholding the power of Missouri to revoke a state permit to engage in interstate motor carrier operations where the carrier had violated state laws relating to intra-state operations; the carrier had applied for a certificate from the Interstate Commerce Commission, but the Commission had not acted on the application. The case is cited with approval in the *Fry* case, 344 U.S. at 162, note 5.)

(2) *H. P. Welch Co. v. New Hampshire*, 306 U.S. 79 (1939) (upholding the power of New Hampshire to suspend the state "registration certificate" of an interstate motor carrier for violation of state law relating to hours of service for drivers. The violations occurred after the enactment of the Federal Motor Carrier Act, but before the effective date of regulations covering hours of service promulgated by the Interstate Commerce Commission. The principle, applicable to the instant case, is that, in the absence of applicable federal regulation, a state may employ licensing as a sanction for regulations designed to promote the public safety and welfare. The case is cited with approval in *Fry*, 344 U.S. at 162, note 5.)

(3) *McDonald v. Thompson*, 305 U.S. 263 (1938) (upholding the power of Texas to withhold a certificate from an interstate carrier on the ground that the proposed operations would subject the highways involved to excessive burden and would endanger and interfere with ordinary use by the public. The carrier was subject to, but had no certificate under the Federal Motor Carrier Act. The Court also held that the carrier's interstate operations without the certificate required by Texas law did not qualify it as having been "in bona fide operation as a common carrier" under the "grandfather" clause of the Motor

Carrier Act. The case is cited with approval in *Fry*, 344 U.S. at 162, note 5.)

(4) *Buck v. California*, 343 U.S. 99 (1952) (upholding the power of San Diego county to require a permit for taxicab operations in foreign commerce, as a sanction for standards relating to the service and public safety. Taxicabs, like terminal vehicles, are excluded from the coverage of Part II of the Interstate Commerce Act with exceptions not here material.)

The same principle was established prior to the enactment of the Federal Motor Carrier Act, and the cases so holding are still in point since that Act does not cover the operations in question here: *Clark v. Poor*, 274 U.S. 554 (1927); *Hicklin v. Coney*, 290 U.S. 169 (1933); *Bradley v. Public Utilities Comm'n of Ohio*, 289 U.S. 92 (1933); *Continental Baking Co. v. Woodring*, 286 U.S. 352 (1932); and see *Texport Carrier Corp. v. Smith*, 8 F. Supp. 28 (D. C. S. D. Tex., 1934).

These principles were not affected by the decision of this Court in *Castle v. Hayes Freight Lines, Inc.*, 348 U.S. 61 (1954). That case held that a state could not suspend the privilege of a *certificated* interstate carrier to do business, and it implied that a state could not in the first instance withhold from *such a carrier* the privilege of doing interstate business, even as a sanction for the violation of valid police regulations. It is abundantly clear from a reading of the Court's opinion, however, that the principle is limited to carriers holding certificates of convenience and necessity from a federal agency, and has no application to carriers not holding such certificates and not eligible for them.

At the outset of its opinion, this Court noted that Hayes' business was "done under a certificate of con-

venience and necessity issued by the Interstate Commerce Commission under authority of the Federal Motor Carrier Act." (348 U.S. at 62)

The business of Transfer is not done under a certificate of convenience and necessity issued by the Interstate Commerce Commission or any other federal agency; it is done under a mere contract with a group of railroads.

The Supreme Court emphasized that the Motor Carrier Act "provides that all certificates, permits or licenses issued by the Commission 'shall remain in effect until suspended or terminated as herein provided.'" (348 U.S. at 63)

The Illinois suspension of Hayes' right to use the highways was in direct conflict with this provision of federal law. In the instant case, Transfer holds no federal permit, there is no federal machinery for revoking its privileges, and there is no federal law preserving its right to operate until its privileges are so revoked.

This Court emphasized that, "... in order to provide stability for operating rights of carriers, Congress placed within very narrow limits the Commission's power to suspend or revoke an outstanding certificate." (348 U.S. at 63) The act required a hearing before the Interstate Commerce Commission and a finding by the Commission of willful violation of the Act or regulations. "Under these circumstances," said this Court, "it would be odd if a state could take action amounting to a revocation or suspension of an interstate carrier's *commission-granted right* to operate." (348 U.S. at 64, emphasis supplied)

Since Transfer holds no federal certificate and cannot obtain one, there is no provision for a federal proceeding to determine whether its right to operate should be revoked or suspended, and therefore nothing to interfere

with the City's employment of licensing as a police measure.

This Court said: "It cannot be doubted that suspension of this common carrier's right to use Illinois highways is the equivalent of a *partial suspension* of its *federally granted* certificate." (348 U.S. at 64 emphasis supplied)

Finally, this Court pointed out that a Commission regulation requires motor carriers subject to the act to abide by valid state highway regulations. "If, therefore, motor carriers persistently and repeatedly violate the laws of a state, we knew of no reason why the Commission may not protect the state's interest, either on the Commission's own initiative or on the complaint of the state." (348 U.S. at 65)

No federal regulation requires Transfer to abide by valid state and city regulations. There is no procedure whereby the City can apply to the Interstate Commerce Commission to enforce valid police regulations against Transfer. Thus, an essential safeguard present in the *Hayes* case is absent here.

There is no escape from the conclusion that the decision of this Court in the *Hayes* case was predicated on a comprehensive and explicit scheme of federal regulation, providing for the issuance of federal certificates of public convenience and necessity, which were to remain in effect until revoked or suspended after carefully devised federal proceedings, and supplying a federal administrative remedy for violation of valid local law. No such scheme and therefore no such foundation for a denial of local power is present in this case. A contract with a group of railroads is plainly no substitute for a federal franchise granted in the context of such a comprehensive regulatory scheme.

Nor can support be found in 49 U.S.C. § 302 (c) that Transfer's operations are regulated by the Interstate Commerce Commission or in some manner come under the Interstate Commerce Act as railroad transportation to effect a federal occupancy of the field or to constitute some form of constructive federal certificate of public convenience and necessity.

Section 202 (c) of the Interstate Commerce Act, Part II, provides in part:

"Notwithstanding any provision of this section or of section 203, the provisions of this part, except the provisions of Section 204 relative to qualifications and maximum hours of service of employees and safety of operation and equipment shall not apply —

* * *

"(2) to transportation by motor vehicle by any person (whether as agent or under a contractual arrangement) for a common carrier by railroad subject to Part I, * * * in the performance within terminal areas of transfer, collection, or delivery service; but such transportation shall be considered to be performed by such carrier * * * as part of, and shall be regulated in the same manner as, the transportation by railroad * * *". (49 U.S.C. § 302 (c) (2))

The Commission pursuant to section 204 of the act promulgated Motor Carrier Safety Regulations which expressly preserved the exercise of local police power as contained in the Chicago Public Passenger Vehicle Code. Regulation 190.33 (49 C.F.R. § 190.53) provides that federal safety regulations, with the exception of maximum hours of employment, shall not apply to "vehicles and drivers used wholly within a municipality or the commercial zone thereof," unless the vehicle is carrying explosives. Transfer operates entirely within a municipality.

Regulation 190.30 (49 C.F.R. §190.30) goes further to assure the preservation of local control, by providing:

“Except as otherwise specifically indicated, Parts 190-197 of this subchapter [the Motor Carrier Safety Regulations] are not intended to preclude States or subdivisions thereof from establishing or enforcing State or local laws relating to safety, the compliance with which would not prevent full compliance with these regulations by the persons subject thereto.”

Thus, in the single area under Part II in which the federal government has exercised powers relevant to the operations of Transfer, safety and maximum hours of employment, the Interstate Commerce Commission specifically recognized the need for local control over safety; and the Chicago Public Passenger Vehicle Code does not deal with maximum hours of employment. Obviously there is no conflict between local and federal authority here.

It was urged below that the terminal passenger transfer service is in effect railroad transportation, since the railroads involved are subject to Interstate Commerce Commission regulation and as such required to establish and maintain through routes. While the Interstate Commerce Act imposes a duty on railroads to establish reasonable through routes and reasonable facilities for operating such routes (49 U.S.C. § 1 (4)), it does not require the railroads to provide terminal transfer service. The opinion of the commission in the case of *Status of Parmelee Transportation Co.*, 288 I.C.C. 95, 100-101 (1953) makes it clear that the provision of transfer service for the through route passengers is done entirely at the option of the railroads:

“There are numerous points throughout the country, however, where the railroads have not assumed the responsibility for providing free transfer service, and

no such arrangements are maintained by them at those points. Although through tickets by way of those points are sold by the railroads, passengers traveling over such routes are required, by appropriate tariff provisions, to make their own transfer arrangements."

Transfer has not secured a federal certificate to operate nor is Transfer eligible for such a certificate under Part I or Part II of the Interstate Commerce Act. In *Status of Parmelee* the commission instituted an investigation

"on its own motion for the purpose of determining whether the Parmelee Transportation Company and the services performed by it are subject to Part I of the Interstate Commerce Act, with a view to entering such orders as may be deemed appropriate." (288 I.C.C. at 95)

The commission found that Parmelee's transfer operations performed under contract with the railroads was exempt from Part II of the Interstate Commerce Act and concluded:

"that the interstation services performed by the respondent [Parmelee] are identical to, and are subject to regulation in the same manner as, transportation or service performed by railroads subject to Part I of the act, but that the respondent is not a carrier as defined in Part II of the act. An order discontinuing the proceeding will be entered." (288 I.C.C. at 104)

The transportation services which concerned the commission in that case were identical with those carried on by Transfer. Thus the commission itself as a result of statute and through regulations has refused to exercise any authority over the operations of Transfer.

We concede that under 49 U.S.C. § 302 (c) Transfer could be subjected to the exercise of some regulatory

authority by the commission. If such federal regulatory control were imposed, then local authority would be precluded with respect to those matters of federal control. In this instance, however, there has been no assertion of federal authority. The City is merely filling a regulatory gap. No basis for supersedure exists.

IV.

THE COURT OF APPEALS ERRED IN PRESUMING THAT THE ORDINANCE WOULD BE UNCONSTITUTIONALLY APPLIED.

A matter of sheer logomachy has introduced confusion and error into the decision of the Court of Appeals, and should be clarified here once and for all. The Chicago ordinance here in question, in requiring licenses for terminal vehicles, speaks of a finding by the commissioner that public convenience and necessity require the service; and among the factors to which the commissioner is required to give "due consideration" is "The effect of an increase in the number of such vehicles upon the ability of the licensee to continue rendering the required service at reasonable fares and charges to provide revenue sufficient to pay for all costs of such service, including fair and equitable wages and compensation for licensee's employees and a fair return on the investment in property devoted to such service." (Municipal Code of Chicago, Section 28-31.1.) Read superficially, this language appears to authorize the commissioner to exercise a discretion on the basis of economic considerations such as were proscribed by *Buck v. Kuykendall*. As this Court has often recognized, however, regulatory measures of this kind are commonly drawn for application to both intrastate and interstate operations; the term "public convenience and necessity" does not necessarily import the exercise of dis-

cretion on the basis of "economic" considerations; the validity of the regulation will be upheld so long as inappropriate provisions are not applied to interstate operations; and the courts will accept as authoritative the construction placed on the regulation by appropriate state officials, disclaiming power or intention to give the regulation unconstitutional application.

In the cases which have been cited, upholding state power to license interstate motor carriers in the interest of public safety and welfare and highway conservation, the statutory requirement normally was that the carrier obtain a certificate of public convenience and necessity. This was so in *Clark v. Poor*, 274 U.S. 554 (1927) (see Ohio Gen. Code, Section 614-87 (1929)); *Hicklin v. Coney*, 290 U.S. 169 (1933) (see S.C. Code 1932, Section 8510); *Bradley v. Public Utilities Comm'n of Ohio*, 289 U.S. 92 (1933); *Eichholz v. Public Utilities Comm'n of Missouri*, 306 U.S. 268 (1939); and *McDonald v. Thompson*, 305 U.S. 263 (1938). Sometimes, as in *Columbia Terminals Co. v. Lambert*, 30 F. Supp. 28 (E.D. Mo. 1939), *Buck v. California*, 343 U.S. 99 (1952), and *Fry Roofing Co. v. Wood*, 344 U.S. 157 (1952), the authority to operate has been designated a "permit"; but that has not been a distinguishing factor. Typically, as in the *Columbia Terminals* case, the statute has also contained language specifying "economic" factors to be taken into consideration by the licensing official—language inappropriate to the exercise of the licensing power with respect to interstate carriers. But this Court has never decided the cases on merely literal grounds. This Court has never doubted that a "certificate of public convenience and necessity" may appropriately be withheld on grounds relating to the valid exercise of the police power, and has invalidated statutes requiring such certificates only when the carrier was able to show, as in

Buck v. Kuykendall, that the license was denied on improper grounds.

(See also *Ex parte Truelock*, 139 Tex. Crim. Rep. 365, 140 S.W. 2d 167, 169 (1940); *Cannon Ball Transportation Co. v. Public Utilities Comm'n of Ohio*, 113 Ohio St. 565, 149 N.E. 713 (1925); *Wald Storage and Transfer Co. v. Smith*, 4 F. Supp. 61 (S.D.Tex., three-judge court 1933) aff'd 290 U.S. 596 (1933).)

In the court of appeals, the *Columbia Terminals* case—a powerful precedent, on all fours with the case at bar—was disposed of in a footnote (note 26) on the ground that, while the licensing statute spoke in terms of a finding of public benefit (i.e., of economic considerations), the state had expressly admitted that it lacked such power and made no such demand. But in this respect the cases are identical. In Appellees' Brief in the court of appeals, signed by John C. Melaniphy, Corporation Counsel and chief legal officer of the City of Chicago, representing the City, the Mayor, the Public License Commissioner, and the Commissioner of Police, there appears the following clear statement (at page 36):

"We concede that the city may not withhold a license to carry on interstate transfer operations solely or even primarily on the ground that existing facilities are adequate, or that additional operations will adversely affect the competitive situation, or other such 'economic' grounds. *Buck v. Kuykendall*, 267 U.S. 37 (1925)." (Emphasis added)

In Part III of the same brief (pages 51-58) the appellees in the court of appeals, including the City and all appropriate officials thereof, urged that the proper construction of the ordinance was the one adopted by Judge LaBuy in the District Court, viz., that the ordinance did not author-

ize the withholding of a license on economic grounds, but only on considerations relating to public safety, traffic, and the conservation and maintenance of streets. Precisely as in *Columbia Terminals*, the City disclaimed any and every authority or intention to give to the ordinance in question an unconstitutional application. It follows that the full force of the reasoning in *Columbia Terminals* is applicable to this case:

"The mere susceptibility of a statute to a construction which could render it unconstitutional does not afford sufficient ground for injunctive relief where, as here, it does not appear that the statute has ever been so construed, where the enforcing authorities affirm a recognition of its unconstitutionality if so construed and disclaim any intention of doing so, and where plaintiff's real ground for relief is not the application of the Statute to it." (30 F. Supp. at 32.)

Clark v. Poor, 274 U.S. 554 (1927), is also squarely in point. The Ohio statute required a certificate of public convenience and necessity. Without applying for a certificate, the carrier, engaged exclusively in interstate commerce, sought an injunction. A three-judge court dismissed the bill, and this Court affirmed, saying (at 556):

"It appeared that while the Act calls the certificate one of 'public convenience and necessity,' the Commission had recognized, before this suit was begun, that, under *Buck v. Kuykendall*, 267 U.S. 307 and *Bush v. Maloy*, 267 U.S. 317, it had no discretion where the carrier was engaged exclusively in interstate commerce, and was willing to grant to plaintiffs a certificate upon application and compliance with other provisions of the law."

The plaintiffs in that case also contended that the decree should be reversed because the statute provided that no certificate should issue until the carrier filed cargo insurance policies. This Court said:

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"The lower court held that, under *Michigan Public Utilities Commission v. Duke*, 266 U.S. 570, this provision could not be applied to exclusively interstate carriers . . . ; and counsel for the Commission stated in this Court that the requirements for insurance would not be insisted upon. Plaintiffs urge that because this was not conceded at the outset, it was error to deny the injunction. The circumstances were such that it was clearly within the discretion of the court to decline to issue an injunction . . ." (274 U.S. at 557-58.) (Emphasis ours)

In refusing to accept the construction placed upon the ordinance by responsible city officials, and in disregarding the canon that legislation is to be construed if possible to avoid constitutional questions, the court of appeals departed from salutary principles established by the decisions of this Court. See *Phyle v. Duffy*, 334 U.S. 431, 441 (1948); *Gerende v. Board of Supervisors of Elections of Baltimore City*, 341 U.S. 56, 57 (1951); *Fox v. Washington*, 236 U.S. 273 (1915); *Alabama State Federation of Labor v. McAdory*, 325 U.S. 450, 470 (1945).

V.

IN GRATUITOUSLY ANTICIPATING CONSTITUTIONAL QUESTIONS, AND IN NOT REQUIRING THE PLAINTIFFS TO EXHAUST THEIR ADMINISTRATIVE REMEDIES, THE COURT OF APPEALS DECIDED A CONSTITUTIONAL QUESTION IN A WAY IN CONFLICT WITH APPLICABLE DECISIONS OF THIS COURT.

Since the City clearly has power, under the cases cited, to require a license as a means of enforcing valid regulations designed to promote public safety and welfare, the invalidation of the ordinance must rest upon apprehension that the ordinance will be unconstitutionally applied, despite the responsible assurances given by counsel that there

is no such intention. Indeed, the opinion of the Court of Appeals appears to adopt the charge made by counsel for the railroads, that "as a purported safety measure, this [the ordinance] is sham and spurious" (R. 207); and that court itself charges without qualification that the ordinance is an attempt to give Parmelee a monopoly of terminal vehicle licenses, "rather than an exercise of the city's police power over traffic." (R. 208)

These are serious charges for any court to make against any legislative body. It is particularly regrettable that a United States court should make such charges against a city council, especially where the city and all its responsible officials have assured the court that they construe the ordinance otherwise, and where the parties invoking the jurisdiction of the court have failed and refused to apply for licenses. Not having applied for a license, Transfer is in the position of obdurately refusing the city's assurance that the ordinance will be applied constitutionally and in good faith, and of charging irresponsibly that the city will, "in the guise of an exercise of its police power, . . . cripple interstate commerce." (R. 208) Throughout this litigation, the attack on the ordinance has been a compound of speculation and conjecture. The argument has been that if Transfer were to apply for a license (which it has no intention of doing), the commissioner would deny the application (which he has not done), and that the evidence (which has not been introduced) in the record (which has not been made) before the commissioner could not support the action (which has not been taken) if it purported to rest on considerations of public safety and welfare as distinguished from prohibited economic considerations. The validity of the ordinance and the good faith of the city cannot be impugned in such a way.

We need not dwell on cases establishing the general principle that requires exhaustion of administrative remedies

(*Myers v. Bethlehem Shipbuilding Corp.*, 303 U.S. 41 (1938); *Aircraft and Diesel Equipment Corp. v. Hirsch*, 331 U.S. 752 (1947); the exact question as it is presented in this case has been decided by this Court. The situation here is identical with that in *Columbia Terminals Co. v. Lambert*, 30 F. Supp. 28, aff'd 309 U.S. 620 (1940). There the district court said:

"One who is within the terms of a statute, valid upon its face, that requires a license or certificate as a condition precedent to carrying on business may not complain because of his anticipation of improper or invalid action in administration [cited cases omitted]. The plaintiff has neglected to make application for a permit covering its operations. . . . Until it does so, it is not in position to invoke the injunctive powers of this Court to restrain the enforcement of the State laws. 'The long-settled rule of judicial administration [is] that no one is entitled to judicial relief . . . until the prescribed administrative remedy has been exhausted.' " (30 F. Supp. at 33-34.)

This Court in its recent decisions has refused to hold unconstitutional a state statute or municipal ordinance requiring a license for interstate motor carrier operations in the absence of an application for a license and a denial on unconstitutional grounds. Those cases holding licensing laws invalid are all cases in which the carrier followed the appropriate procedure, pursued his administrative remedies, applied for a license, made a record suitable for judicial review, and presented the reviewing court with evidence that the license had been denied or withdrawn on unconstitutional grounds. Where the carrier has sought relief by injunction or otherwise without pursuing his administrative remedies, relief has been denied.

In *Buck v. Kuykendall*, 267 U.S. 307 (1925), where the Court held the licensing requirement invalid, it acted on

the basis of a record showing the denial of a license and the grounds of denial. The same is true of *Bush v. Maloy*, 267 U.S. 317 (1925).

On the other hand, in *Continental Baking Co. v. Woodring*, 286 U.S. 352 (1932), where the carrier sought an injunction without applying for a license, relief was denied. In *Hicklin v. Caney*, 290 U.S. 169 (1933), where the carrier, without applying for a license, resisted an enforcement proceeding on the ground of invalidity, the defense failed. In *McDonald v. Thompson*, 305 U.S. 263 (1938), where the carrier sought an injunction without applying for a license, relief was denied. In *Buck v. California*, 343 U.S. 99 (1952), the defendants asserted the invalidity of the statute as a defense to an enforcement proceeding. While they had made oral applications for licenses, the ordinance required written applications, and the record failed to show the grounds for denial. The situation was equivalent to one in which no application had been made, and the defense failed. In *Fry Roofing Co. v. Wood*, 344 U.S. 157 (1952), the carrier sought an injunction without applying for a license, and relief was denied. Similarly, in *State v. Nagle*, 148 Me. 197, 91 A.2d 397 (1952), the carrier, without applying for a license, asserted the invalidity of the ordinance as a defense to an enforcement proceeding. The defense failed, the court saying:

“Even though the issue of the permit is mandatory provided the condition of the highways to be used is such that it would be safe for the operation proposed, and the safety of other users of the highways would not be endangered thereby, the Public Utilities Commission under the statute here in question has not only the duty but the power and authority to determine these questions as questions of fact.” (148 Me. 197, 207-8, 91 A.2d 397, 402.)

The point is made with great clarity in *Clark v. Poor*, 274 U.S. 554 (1927). There the carrier, ignoring the provisions of the statute, operated without applying for a certificate, and sought injunctive relief against enforcement. There, as here and as in *Fry and Columbia Terminals*, the licensing laws read in terms of economic factors as well as of valid police regulation, but the local authorities had disclaimed any authority or intention to withhold a license on grounds proscribed by *Buck v. Kuykendall*. Relief was denied. "The plaintiffs did not apply for a certificate or offer to pay the taxes. They refused or failed to do so, not because insurance was demanded, but because of their belief that, being engaged exclusively in interstate commerce, they could not be required to apply for a certificate or to pay the tax. Their claim was unfounded." This Court's disposition of that appeal furnishes, we submit, the model for the disposition of the appeal in this case:

"The decree dismissing the bill is affirmed, but without prejudice to the right of the plaintiffs to seek appropriate relief by another suit if they should hereafter be required by the Commission to comply with conditions or provisions not warranted by law." (274 U.S. at 558.)

VI.

THE COURT OF APPEALS ERRED IN INQUIRING INTO THE MOTIVES OF THE CITY COUNCIL IN ORDER TO STRIKE DOWN THE ORDINANCE.

On the basis of certain records of the Committee on Local Transportation of the City Council, the Court of Appeals attributed to the City Council improper motives in the enactment of the amendment of 1955, and on the basis of such supposed motives held invalid an ordinance otherwise valid.

This Court has reiterated, time and again, that it is not the function of the federal courts to question the motives of legislatures. Only recently, speaking for the Court, Mr. Justice Frankfurter said:

"The holding of this Court in *Fletcher v. Peck*, 6 Cranch 87, 130, that it was not consonant with our scheme of government for a court to inquire into the motives of legislators, has remained unquestioned. See cases cited in *Arizona v. California*, 283 U.S. 423, 455." *Tenney v. Brandhove*, 341 U.S. 367, 377 (1951).

That this doctrine refers not only to the motives of federal legislators, which were involved in the *Brandhove* case, but to legislators of the states as well, is apparent not only from the reference to *Fletcher v. Peck*, but from the specific statement in *Arizona v. California*: "Similarly, no inquiry may be made concerning the motives or wisdom of a state legislature acting within its proper powers." 283 U.S. at 455, n. 7. Or to use Mr. Justice Holmes' language, in a case which, like this one, involved an attack on a legislature's amendment of its own legislation: "... we do not inquire into the knowledge, negligence, methods or motives of the legislature if, as in this case, the repeal was passed in due form." *Calder v. Michigan ex rel. Ellis*, 218 U.S. 591, 598 (1910).

Of the long series of cases substantiating the proposition that the Court of Appeals erred in looking beyond the legislation to the motives of the legislators, two more are of particular interest. In *Daniel v. Family Security Life Ins. Co.*, 336 U. S. 220 (1949), the contention was that the legislation in issue had been secured by competitors of the plaintiff in order to maintain their own preferred position rather than to abate evils which the state had the right to abate. The Court there sustained the regulation and stated:

"It is said that the 'insurance lobby' obtained this statute from the South Carolina legislature. But a judiciary must judge by results, not by the varied factors which may have determined legislators' votes. We cannot undertake a search for motive in testing constitutionality." (336 U.S. at 224.)

In *Railway Express Agency, Inc. v. New York*, 336 U.S. 106 (1949), an attack was made on a police regulation which forbade trucks to carry advertising on their sides unless the advertising was on behalf of the owner and operator of the trucks. The challenge was made, in part on the grounds of the Commerce Clause, that such a regulation could not possibly have anything to do with the exercise of the police power. In the course of its opinion the Court said:

"We would be trespassing on one of the most intensely local and specialized of all municipal problems if we held that this regulation had no relation to the traffic problem of New York City. It is the judgment of the local authorities that it does have such a relation. And nothing has been advanced which shows that to be palpably false." (336 U.S. at 109.)

"The local authorities may well have concluded that those who advertise their own wares on their trucks do not present the same traffic problem in view of the nature or extent of the advertising which they use. It would take a degree of omniscience which we lack to say that such is not the case. If that judgment is correct, the advertising displays that are exempt have less incidence on traffic than those of appellants." (336 U.S. at 110.)

"It is finally contended that the regulation is a burden on interstate commerce in violation of Art. I, § 8 of the Constitution. Many of these trucks are engaged in delivering goods in interstate commerce from New Jersey to New York. Where traffic control and

the use of highways are involved and where there is no conflicting federal regulation, great leeway is allowed local authorities, even though the local regulation materially interferes with interstate commerce. The case in that posture is controlled by *South Carolina State Highway Dept. v. Barnwell-Bros.*, 303 U. S. 177." (336 U.S. at 111, emphasis added.)

See also *Breard v. Alexandria*, 341 U.S. 622, 639 (1951).

That Illinois law requires the same result is made abundantly clear by the long line of authorities cited in Judge LaBuy's opinion in the District Court. See 136 F. Supp. 476, at 483.

Furthermore, the court of appeals has misconceived and misconstrued the legislative history and purpose involved in the 1955 amendment. To the extent that this history has any pertinence, it reveals clearly that the City did not seek to grant an exclusive right to Parmelee or any other company, but that the City exercised its right to control the commercial use of its streets by terminal vehicles; sought to permit Parmelee to continue operating commercially over city streets without the necessity of a contract with the railroads, and permitted additional licenses to be issued upon appropriate showing. Having broadened the definition of terminal vehicles, the City set up a reasonable system for regulating the issuance of additional licenses. This is in line with action taken by the City Council in other similar situations involving the City's licensing powers. This reasonable construction of the legislative history of the 1955 amendment is fully supported by the stenographic transcript and minutes of the local transportation committee upon which the court of appeals relies for its misconception. (R. 90-5)

In short, the court of appeals erroneously sought to determine the motive of the City Council in amending the ordinance; speculated erroneously on the nature of that

motive, attributing illegal and improper motives to the City Council; and, disregarding the responsible assurances and commitments made to the court by the city's chief legal officer, struck down a valid ordinance on the basis of an unwarranted and presumptuous conviction that the ordinance, as a police measure, was "sham and spurious." In so doing, the court exceeded its judicial powers.

VII.

THE COURT OF APPEALS ERRED IN SUBSTITUTING ITS JUDGMENT FOR THAT OF THE CITY COUNCIL ON THE PURELY LEGISLATIVE QUESTION OF WHETHER LICENSING IS A NECESSARY OR DESIRABLE SANCTION FOR THE IMPLEMENTATION OF THE CITY'S POLICE REGULATION OF TERMINAL VEHICLES.

In taking the position that no governmental control over the number of terminal vehicles in operation was necessary in order to avoid traffic congestion, protect the safety of the public, and preserve the streets of the city, and that the license requirement was not a necessary sanction for the implementation of the city's legitimate police powers, the court of appeals assumed to substitute its judgment for that of the city council on a matter clearly within its legislative discretion.

At page 11 of its opinion the court of appeals says:

"To us it appears that the cost of maintaining the terminal vehicle service, which is initially borne by Transfer and ultimately, to the extent of coupons issued and used, by the individual Terminal Lines, will operate effectively as an economic brake upon any unjustified increase in the number of such vehicles." (R. 208)

This is tantamount to a determination that regulation of the number of terminal vehicles in operation is unneces-

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sary for protection of the public safety and for conservation of the streets. Such a determination calls for the exercise of legislative judgment. Regulation of the use of the streets is committed to the City Council, which has determined that regulation of such vehicles is necessary in the public interest. Moreover, the Court's statement overlooks those aspects of the ordinance which regulate aspects of the terminal vehicle business other than the mere number of vehicles employed.

At page 13 of its opinion the court of appeals says:

"If Transfer's vehicles do not conform to the requirements contained in the prior [sic] ordinance, the city may refuse to issue licenses for the nonconforming vehicles and penalize their unlicensed operation in accordance with § 28-32. So, also, whenever Transfer is found guilty of violating § 28-17 *the city may proceed against it according to the penalties section.*" (Emphasis supplied. Appendix page 31a)

Passing the point, which becomes clear on even a cursory reading of the ordinance, that licensing is in many respects the only effective implementation for the city's plan for regulating public passenger vehicles, it is abundantly clear that the court exceeded its judicial authority in passing judgment on the need for the license as a sanction. If, as we submit, the City has power to use the licensing sanction in furtherance of its legitimate police powers, it was not competent for the court of appeals to determine that that sanction is not to be employed because direct remedies by way of fines for violations of the safety provisions of the ordinance are adequate. The choice of available sanctions to implement a regulatory scheme is surely a matter for legislative discretion alone. *Robinson v. United States*, 324 U. S. 282, 286 (1945); *Building Service Employers International Union, Local 262 v. Gazzam*, 339 U.S. 532, 540 (1950); *Watson v. Buck*, 313 U.S. 387, 403 (1941).

CONCLUSION.

The judgment of the court of appeals should be vacated and the judgment of the district court reinstated, without prejudice to the right of the appellees-respondents to apply for relief when or if the City attempts to subject them to unconstitutional requirements.

Respectfully submitted,

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APPENDIX A.

MUNICIPAL CODE OF CHICAGO

CHAPTER 28

PUBLIC PASSENGER VEHICLES

- 28- 1. Definitions
- 28- 2. License required
- 28- 3. Interurban operations
- 28- 4. Inspections
- 28- 4.1. Specifications
- 28- 5. Application
- 28- 6. Investigation and issuance of license
- 28- 7. License fees
- 28- 8. Renewal of licenses
- 28- 9. Personal license—fair employment practice
- 28-10. Emblem
- 28-11. License card
- 28-12. Insurance
- 28-13. Payment of judgments and awards
- 28-14. Suspension of license
- 28-15. Revocation of license
- 28-16. Interference with commissioner's duties
- 28-17. Front seat passenger
- 28-18. Notice
- 28-19. Livery vehicles
- 28-19.1. Taximeter prohibited
- 28-19.2. Solicitation of passengers prohibited
- 28-20. Livery advertising
- 28-21. Sightseeing vehicles
- 28-22. Taxicabs
- 28-22.1. Public convenience and necessity
- 28-23. Identification of taxicab and cabman
- 28-24. Taximeters
- 28-25. Taximeter inspection

- 28-26. Tampering with meters
- 28-27. Taximeter inspection fee.
- 28-28. Taxicab service
- 28-29. Group riding
- 28-29.1. Front seat passenger
- 28-30. Taxicab fares
- 28-31. Terminal vehicle
- 28-32. Penalty

28-1. As used in this chapter:

“Busman” means a person engaged in business as proprietor of one or more sightseeing buses.

“Cabman” means a person engaged in business as proprietor of one or more taxicabs or livery vehicles.

“Chauffeur” means the driver of a public passenger vehicle licensed by the city of Chicago as a public chauffeur.

“City” means the city of Chicago.

“Coachman” means a person engaged in business as proprietor of one or more terminal vehicles.

“Commissioner” means the public vehicle license commissioner, or any other body or officer having supervision of public passenger vehicle operations in the city.

“Council” means the city council of the city of Chicago.

“Livery vehicle” means a public passenger vehicle for hire only at a charge or fare for each passenger per trip or for each vehicle per trip fixed by agreement in advance.

“Person” means a natural person, firm or corporation in his own capacity and not in a representative capacity, the personal pronoun being applicable to all such persons of any number or gender.

“Public passenger vehicle” means a motor vehicle, as defined in the Motor Vehicle Law of the State of Illinois, which is used for the transportation of passengers for hire, excepting those devoted exclusively for funeral use or in

operation of a metropolitan transit authority or public utility under the laws of Illinois.

"Sightseeing vehicle" means a public passenger vehicle for hire principally on sightseeing tours at a charge or fare per passenger for each tour fixed by agreement in advance or for hire otherwise at a charge for each vehicle per trip fixed by agreement in advance.

"Taxicab" means a public passenger vehicle for hire only at lawful rates of fare recorded and indicated by taximeter in operation when the vehicle is in use for transportation of any passenger.

"Taximeter" means any mechanical device which records and indicates a charge or fare measured by distance traveled, waiting time and extra passengers.

"Terminal vehicle" means a public passenger vehicle which is operated exclusively for the transportation of passengers from railroad terminal stations and steamship docks to points within the area defined in Section 28-31.

28-2. It is unlawful for any person other than a metropolitan transit authority or public utility to operate any vehicle, or for any such person who is the owner of any vehicle to permit it to be operated, on any public way for the transportation of passengers for hire from place to place within the corporate limits of the city, except on a funeral trip, unless it is licensed by the city as a public passenger vehicle.

It is unlawful for any person to hold himself out to the public by advertisement or otherwise as a busman, cabman or coachman or as one who provides or furnishes any kind of public passenger vehicle service unless he has one or more public passenger vehicles licensed for the class of service offered; provided that any association or corporation which furnishes call service for transportation may advertise the class of service which may be rendered to its members or subscribers, as provided in this chapter, if it assumes the liability and furnishes the insurance as required by section 28-23.

28-3. Nothing in this chapter shall be construed to prohibit any public passenger vehicle from coming into the city to discharge passengers accepted for transportation outside the city. While such vehicle is in the city no person shall solicit passengers therefor and no roof light or other special light shall be used to indicate that the vehicle is vacant or subject to hire. A white card bearing the words "Not For Hire" printed in black letters not less than two inches in height shall be displayed on the windshield of the vehicle. Any person in control or possession of such vehicle who violates the provisions of this section shall be subject to arrest and fine of not less than fifty dollars nor more than two hundred dollars for each offense.

28-4. No vehicle shall be licensed as a public passenger vehicle until it has been inspected under the direction of the commissioner and found to be in safe operating condition and to have adequate body and seating facilities which are clean and in good repair for the comfort and convenience of passengers.

28-4.1. No vehicle shall be licensed as a livery vehicle or taxicab unless it has two doors on each side, and no vehicle having seating capacity for more than seven passengers shall be licensed as a public passenger vehicle unless it has at least three doors on each side or fixed aisle space for passage to doors.

28-5. Application for public passenger vehicle licenses shall be made in writing signed and sworn to by the applicant upon forms provided by the commissioner. The application shall contain the full name and Chicago street address of the applicant, the manufacturer's name, model, length of time in use, horse power and seating capacity of the vehicle applicant will use if a license is issued, and the class of public passenger vehicle license requested. The commissioner shall cause each application to be stamped with the time and date of its receipt. The applicant shall submit a statement of his assets and liabilities with his application.

28-6. Upon receipt of an application for a public passenger vehicle license the commissioner shall cause an

investigation to be made of the character and reputation of the applicant as a law abiding citizen; the financial ability of the applicant to render safe and comfortable transportation service, to maintain or replace the equipment for such service and to pay all judgments and awards which may be rendered for any cause arising out of the operation of a public passenger vehicle during the license period. If the commissioner shall find that the applicant is qualified and that the vehicle for which a license is applied for is in safe and proper condition as provided in this chapter, the commissioner shall issue a public passenger vehicle license to the owner of the vehicle for the license period ending on the thirty-first day of December following the date of its issuance, subject to payment of the public passenger vehicle license fee for the current year.

28-7. The annual fee for each public passenger vehicle license of the class herein set forth is as follows:

Livery vehicle	\$ 25.00
Sightseeing vehicle	125.00
Taxicab	40.00
Terminal vehicle	25.00

Said fee shall be paid in advance when the license is issued and shall be applied to the cost of issuing such license, including, without being limited to, the investigations, inspections and supervision necessary therefor, and to the cost of regulating all operations of public passenger vehicles as provided in this chapter.

Nothing in this section shall affect the right of the city to impose or collect a vehicle tax and any occupational tax, as authorized by the laws of the state of Illinois, in addition to the license fee herein provided.

28-8. All licenses for public passenger vehicles issued for the year 1951, which have not been revoked or surrendered prior to the time when such licenses for the year 1952 shall have been issued, may be renewed from year to year, subject to the provisions of this chapter.

28-9. No public passenger vehicle license shall be subject to voluntary assignment or transfer by operation of law, except in the event of the licensee's induction or recall into the armed forces of the United States for active duty or in the event of the licensee's death. In case of death the assignment shall be made by the legal representatives of his estate. No assignment shall be effective until the assignee shall have filed application for a license and is found to be qualified as provided in sections 28-5 and 28-6. If qualified the license shall be transferred to him by the commissioner, subject to payment of a transfer fee of \$50.00; the assumption by the assignee of all liabilities for loss, or damage resulting from any occurrence arising out of or caused by the operation or use of the licensed public passenger vehicle before the effective date of the transfer and the approval by the commissioner of the insurance to be furnished by the busman, cabman or coachman as required by section 28-12.

It is unlawful for any busman, cabman or coachman to lease or loan a licensed public passenger vehicle for operation by any person for transportation of passengers for hire within the city. No person other than a chauffeur, who is either the busman, cabman or coachman or one hired by the busman, cabman or coachman to drive such vehicle as his agent or employee, in the manner prescribed by the busman, cabman or coachman, shall operate such vehicle for the transportation of passengers for hire within the city.

There shall be no discrimination by any busman, cabman or coachman against any person employed or seeking employment as a chauffeur with respect to hire, promotion, tenure, terms, conditions and privileges of employment on account of race, color, religion, national origin or ancestry.

28-10. The commissioner shall deliver with each license a sticker license emblem which shall bear the words "Public Vehicle License" and "Chicago" and the numerals designating the year for which such license is issued, a reproduction of the corporate seal of the city, the names of the

mayor and the commissioner and serial number identical with the number of the public vehicle license. The predominant back-ground colors of such sticker license emblems shall be different from the vehicle tax emblem for the same year and shall be changed annually. The busman, cabman or coachman shall affix, or cause to be affixed, said sticker emblem on the inside of the glass part of the windshield of said vehicle.

28-11. In addition to the license and sticker emblem the commissioner shall deliver a license card for each vehicle. Said card shall contain the name of the busman, cabman or coachman, the license of the vehicle and the date of inspection thereof. It shall be signed by the commissioner and shall contain blank spaces upon which entries of the date of every inspection of the vehicle and such other entries as may be required shall be made. It shall be of different color each year. A suitable frame with glass cover shall be provided and affixed on the inside of the vehicle in a conspicuous place and in such manner as may be determined by the commissioner for insertion and removal of the public passenger vehicle license card; and in every livery vehicle and taxicab said frame shall also be provided for insertion and removal of the chauffeur's license card and such other notice as may be required by the provisions of this chapter and the rules of the commissioner. It is unlawful to carry any passenger or his baggage unless the license cards are exposed in the frame as provided in this section.

28-12. Every busman, cabman or coachman shall carry public liability and property damage insurance and workmen's compensation insurance for his employees with solvent and responsible insurers approved by the commissioner, authorized to transact such insurance business in the state of Illinois, and qualified to assume the risk for the amounts hereinafter set forth under the laws of Illinois, to secure payment of any loss or damage resulting from any occurrence arising out of or caused by the operation or use of any of the busman's, cabman's or coachman's public passenger vehicles.

The public liability insurance policy or contract may cover one or more public passenger vehicles; but each vehicle shall be insured for the sum of at least five thousand dollars for property damage and fifty thousand dollars for injuries to or death of any one person and each vehicle having seating capacity for not more than seven adult passengers shall be insured for the sum of at least one hundred thousand dollars for injuries to or death of more than one person in any one accident. Each vehicle having seating capacity for more than seven adult passengers shall be insured for injuries to or death of more than one person in any one accident for at least five thousand dollars more for each such additional passenger capacity. Every insurance policy or contract for such insurance shall provide for the payment and satisfaction of any final judgment rendered against the busman, cabman or coachman and person insured, or any person driving any insured vehicle, and that suit may be brought in any court of competent jurisdiction upon such policy or contract by any person having claims arising from the operation or use of such vehicle. It shall contain a description of each public passenger vehicle insured, manufacturer's name and number, the state license number and the public passenger vehicle license number.

In lieu of an insurance policy or contract a surety bond or bonds with a corporate surety or sureties authorized to do business under the laws of Illinois, may be accepted by the commissioner for all or any part of such insurance; provided that each bond shall be conditioned for the payment and satisfaction of any final judgment in conformity with the provisions of an insurance policy required by this section.

All insurance policies or contracts or surety bonds required by this section, or copies thereof certified by the insurers or sureties, shall be filed with the commissioner and no insurance or bond shall be subject to cancellation except on thirty days' previous notice to the commissioner. If any insurance or bond is cancelled or permitted to lapse for any reason, the commissioner shall suspend the license

for the vehicle affected for a period not to exceed thirty days, to permit other insurance or bond to be supplied in compliance with the provisions of this section. If such other insurance or bond is not supplied, within the period of suspension of the license, the mayor shall revoke the license for such vehicle.

28-13. All judgments and awards rendered by any court or commission of competent jurisdiction for loss or damage in the operation or use of any public passenger vehicle shall be paid by the busman, cabman or coachman within ninety days after they shall become final and not stayed by supersedeas. This obligation is absolute and not contingent upon the collection of any indemnity from insurance.

28-14. If any public passenger vehicle shall become unsafe for operation or if its body or seating facilities shall be so damaged, deteriorated or unclean as to render said vehicle unfit for public use, the license therefor shall be suspended by the commission until the vehicle shall be made safe for operation and its body shall be repaired and painted and its seating facilities shall be reconditioned or replaced as directed by the commissioner. In determining whether any public passenger vehicle is unfit for public use the commissioner shall give consideration to its effect on the health, comfort and convenience of passengers and its public appearance on the streets of the city.

Upon suspension of a license for any cause, under the provisions of this chapter, the license sticker emblem shall be removed by the commissioner from the windshield of the vehicle and an entry of the suspension shall be made on the license card. If the suspension is terminated an entry thereof shall be made on the license card by the commissioner and a duplicate license sticker shall be furnished by the commissioner for a fee of one dollar. The commissioner shall notify the department of police of every suspension and termination of suspension.

28-15. If any summons or subpoena issued by a court or commission cannot be served upon the busman, cabman or coachman at his last Chicago address recorded in the

office of the commission within sixty days after such process is delivered to the person authorized to serve it, and the busman, cabman or coachman fails to appear in answer to such process for want of service, or if any busman, cabman or coachman shall refuse or fail to pay any judgment or award as provided in section 28-13, or shall lease or loan any of his licensed public passenger vehicles for operation by any person for hire or shall be convicted of a felony or any criminal offense involving moral turpitude, the mayor shall revoke all public vehicle licenses held by him.

If any public passenger vehicle license was obtained by application in which any material fact was omitted or stated falsely, or if any public passenger vehicle is operated in violation of the provisions of this chapter for which revocation of the license is not mandatory, or if any public passenger vehicle is operated in violation of the rules and regulations of the commissioner relating to the administration and enforcement of the provisions of this chapter, the commissioner may recommend to the mayor that the public passenger vehicle license therefor be revoked and the mayor, in his discretion, may revoke said license.

Upon revocation of any license, the commissioner shall remove the license sticker emblem and the license card from the vehicle affected.

28-16. Every busman, cabman or coachman shall deliver or submit his public passenger vehicles for inspection or the performance of any other duty by the commissioner upon demand. It is unlawful for any person to interfere with or hinder or prevent the commissioner from discharging any duty in the enforcement of this chapter.

28-17. It is unlawful to permit more than one passenger to occupy the front seat with the chauffeur in any public passenger vehicle.

28-18. It is the duty of every busman, cabman or coachman to notify the commissioner whenever any change in his Chicago address is made. Any notice required to be

given to the busman, cabman or coachman shall be sufficient if addressed to the last Chicago address recorded in the office of the commissioner.

28-19. No person shall be qualified for a livery vehicle license and a taxicab license at the same time; nor shall any person having a livery vehicle license be associated with anyone for sending or receiving calls for taxicab service.

No license for any livery vehicle shall be issued except in the annual renewal of such license or upon transfer to permit replacement of a vehicle for that licensed unless, after a public hearing, the commissioner shall determine that public convenience and necessity require additional livery service and shall recommend to the council the maximum number of such licenses to be authorized by ordinance.

Not more than six passengers shall be accepted for transportation in a livery vehicle on any trip.

28-19.1. It is unlawful for any person to operate or drive a livery vehicle equipped with a meter which registers a charge or fare or indicates the distance traveled by which the charge or fare to be paid by a passenger is measured.

28-19.2. It is unlawful for any person to solicit passengers for transportation in a livery vehicle on any public way. No such vehicle shall be parked on any public way for a time longer than is reasonably necessary to accept passengers in answer to a call for service and no passengers shall be accepted for any trip in such vehicle without previous engagement for such trip, at a fixed charge or fare, through the station or office from which said vehicle is operated.

28-20. It is unlawful for the cabman of any livery vehicle, or the station from which it is operated to use the word "taxi", "taxicab" or "cab" in connection with or as part of the name of the cabman or his trade name.

The outside of the body of each livery vehicle shall be uniform black, blue or blue-black color. No light fixtures or lights shall be attached to or exposed so as to be visible outside of any livery vehicle; except such as are required by the law of the state of Illinois regulating traffic by motor vehicles and one rear red light in addition to those required by said law. No name, number or advertisement of any kind, excepting official license emblems or plates, shall be painted or carried so as to be visible outside of any livery vehicle.

It is unlawful for any person to hold himself out to the public by advertisement, or otherwise, to render any livery service unless he is the cabman of a licensed livery vehicle.

28-21. Sightseeing vehicles shall not be used for transportation of passengers for hire except on sightseeing tours or chartered trips. Passengers for sightseeing tours shall not be solicited upon any public way except at bus stands especially designated by the council for sightseeing vehicles.

It is unlawful for any cabman or coachman to advertise his public passenger vehicle for hire on sightseeing tours.

28-22. Every taxicab shall be operated regularly to the extent reasonably necessary to meet the public demand for service. If the service of any taxicab is discontinued for any reason except on account of strike, act of God or cause beyond the control of the cabman, the commissioner may give written notice to the cabman to restore the taxicab to service, and if it is not restored within five days after notice, the commissioner may recommend to the mayor that the taxicab license be revoked and the mayor, in his discretion, may revoke same.

28-22.1 Not more than 3761 taxicab licenses shall be issued unless, after a public hearing, the commissioner shall report to the council that public convenience and necessity require additional taxicab service and shall recommend the number of taxicab licenses which may be issued. Notice of such hearing stating the time and place thereof shall be

published in the official newspaper of the city at least twenty days prior to the hearing and by mailing a copy thereof to all taxicab licensees. At such hearing any licensee, in person or by attorney, shall have the right to cross-examine witnesses and to introduce evidence pertinent to the subject. At any time and place fixed for such hearing it may be adjourned to another time and place without further notice.

In determining whether public convenience and necessity require additional taxicab service, due consideration shall be given to the following:

1. The public demand for taxicab service;
2. The effect of an increase in the number of taxicabs on the safety of existing vehicular and pedestrian traffic;
3. The effect of increased competition,
 - (a) on revenues of taxicab licensees;
 - (b) on cost of rendering taxicab service, including provisions for proper reserves and a fair return on investment in property devoted to such service;
 - (c) on the wages or compensation, hours, and conditions of service of taxicab chauffeurs;
4. The effect of a reduction, if any, in the level of net revenues to taxicab licensees on reasonable rates of fare for taxicab service;
5. Any other facts which the commissioner may deem relevant.

If the commissioner shall report that public convenience and necessity require additional taxicab service, the council, by ordinance, may fix the maximum number of taxicab licenses to be issued, not to exceed the number recommended by the commissioner.

28-23. Every taxicab shall have the cabman's name, telephone number and the public passenger vehicle license number plainly painted in plain Gothic letters and figures of three-eighth inch stroke and at least two inches in height

in the center of the main panel of the rear doors of said vehicle. In lieu of the cabman's telephone number the name and telephone number of any corporation or association with which the cabman is affiliated may be painted in the same manner, provided such corporation or association shall have assumed equal liability with the cabman for any loss or damage resulting from any occurrence arising out of or caused by the operation or use of any of the cabman's taxicabs and shall carry and furnish to the commissioner public liability and property damage insurance to secure payment of such loss or damage as provided in section 28-12. The public vehicle license number assigned to any taxicab shall be assigned to the same vehicle or to any vehicle substituted therefor upon annual renewal of the license. No other name, number or advertisement of any kind, excepting signs required by this chapter, official license emblems or plates and a trade emblem, in a manner approved by the commissioner, shall be painted or carried so as to be visible on the outside of any taxicab.

28-24. Every taxicab shall be equipped with a taximeter connected with and operated from the transmission of the taxicab to which it is attached. The taximeter shall be equipped with a flag at least three inches by two inches in size. The flag shall be plainly visible from the street and shall be kept up when the taxicab is for hire and shall be kept down when it is engaged.

Taximeters shall have a dial or dials to register the tariff in accordance with the lawful rates and charges. The dial shall be in plain view of the passenger while riding and between sunset and sunrise the dial shall be lighted to enable the passenger to read it.

It is unlawful to operate a taxicab for hire within the city unless the taximeter attached thereto has been sealed by the commission.

28-25. At the time a taxicab license is issued and semi-annually thereafter the taximeter shall be inspected and tested by the commissioner to determine if it complies

with the specifications of this chapter and accurately registers the lawful rates and charges. If it is in proper condition for use, the taximeter shall be sealed and a written certificate of inspection shall be issued by the commissioner to the cabman. Upon complaint by any person that a taximeter is out of working order or does not accurately register the lawful rates and charges it shall be again inspected and tested and, if found to be in improper working condition or inaccurate, it shall be unlawful to operate the taxicab to which it is attached until it is equipped with a taximeter which has been inspected and tested by the commissioner, found to be in proper condition, sealed and a written certificate of inspection therefor is issued.

The cabman or person in control or possession of any taxicab shall deliver it with the taximeter attached or deliver the taximeter detached from the taxicab for inspection and test as requested by the commissioner. The cabman may be present or represented when such inspection and test is made.

28-26. It is unlawful for any person to tamper with, mutilate or break any taximeter or the seal thereof or to transfer a taximeter from one taxicab to another for use in transportation of passengers for hire before delivery of the taxicab with a transferred taximeter for inspection test and certification by the commissioner as provided in section 28-25.

28-27. The fee for each certificate of inspection shall be three dollars, but no charge shall be made for any certificate when the inspection and test is made upon complaint, and it is found that the taximeter is in proper working condition and accurately registers the lawful rates and charges.

28-28. It is unlawful to refuse any person transportation to any place within the city in any taxicab which is unoccupied by a passenger for hire unless it is on its way to pick up a passenger in answer to a call for service or it is out of service for any other reason. When any taxicab in answering a call for service or is otherwise out of

service it shall not be parked at a cabstand, and no roof light or other special light shall be used to indicate that the vehicle is vacant or subject to hire. A white card bearing the words "Not For Hire" printed in black letters not less than two inches in height shall be displayed on the windshield of such taxicab.

28-29. Group riding is prohibited in taxicabs, except as directed by the passenger first engaging the taxicab. Not more than five passengers shall be accepted for transportation on any trip; provided that additional passengers under twelve years of age accompanied by an adult passenger shall be accepted if the taxicab has seating capacity for them.

28-29.1. No passenger shall be permitted to ride on the front seat with the chauffeur of the taxicab unless all other seats are occupied.

28-30. Rates of fare for taxicabs shall be as follows:

For the first one-quarter of a mile or fraction thereof for one person25 cents

For each additional one-half of a mile or fraction thereof for one person10 cents

For each additional person of twelve years or more for the whole trip10 cents

For each three minutes of waiting time or fraction thereof10 cents

Waiting time shall include the time beginning three minutes after call time at the place to which the taxicab has been called when it is not in motion, the time consumed by unavoidable delays at street intersections, bridges or elsewhere and the time consumed while standing at the direction of a passenger.

Every passenger under twelve years of age when accompanied by an adult shall be carried without charge.

Ordinary hand baggage of passengers shall be carried without charge. A fee of twenty-five cents may be charged for carrying a trunk, but no trunk shall be carried except inside of the taxicab.

Immediately on arrival at the passenger's destination it shall be the duty of the chauffeur to throw the taximeter lever to the non-recording position and to call the passenger's attention to the fare registered.

It is unlawful for any person to demand or collect any fare for taxicab service which is more or less than the rates established by the foregoing schedule, or for any passenger to refuse payment of the fare so registered.

28-31. Terminal vehicles shall not be used for transportation of passengers for hire except from *railroad terminal stations and steamship docks* to destinations in the area bounded on the north by E. and W. Ohio Street; on the west by N. and S. Desplaines Street; on the south by E. and W. Roosevelt Road; and on the east by Lake Michigan.

28-31.1. No license for any terminal vehicle shall be issued except in the annual renewal of such license or upon transfer to permit replacement of a vehicle for that licensed unless, after a public hearing held in the same manner as specified for hearings in Section 28-22.1, the commissioner shall report to the council that public convenience and necessity require additional terminal vehicle service and shall recommend the number of such vehicle licenses which may be issued.

In determining whether public convenience and necessity require additional terminal vehicle service due consideration shall be given to the following:

1. The public demand for such service;
2. The effect of an increase in the number of such vehicles on the safety of existing vehicular and pedestrian traffic in the area of their operation;
3. The effect of an increase in the number of such vehicles upon the ability of the licensee to continue rendering the required service at reasonable fares and charges to provide revenue sufficient to pay for all costs of such service, including fair and equitable wages and compensation for licensee's employees and a fair return on the investment in property devoted to such service;

4. Any other facts which the commissioner may deem relevant.

If the commissioner shall report that public convenience and necessity require additional terminal vehicle service, the council, by ordinance, may fix the maximum number of terminal vehicle licenses to be issued not to exceed the number recommended by the commissioner.

28-31.2. The rate of fare for local transportation of every passenger in terminal vehicles of the licensee shall be uniform, regardless of the distance traveled; provided that children under 12 years of age, when accompanied by an adult, shall be carried at not more than half fare. Such rates of fare shall be posted in a conspicuous place or places within each vehicle as determined by the commissioner.

28-32. Any person violating any provision of this chapter for which a penalty is not otherwise provided shall be fined not less than \$5.00 nor more than \$100.00 for the first offense, not less than \$25.00 nor more than \$100.00 for the second offense during the same calendar year, and not less than \$50.00 nor more than \$100.00 for the third and succeeding offenses during the same calendar year, and each day that such violation shall continue shall be deemed a separate and distinct offense.

IN THE
Supreme Court of the United States

OCTOBER TERM, 1957.

No. 104

PARMELEE TRANSPORTATION CO.,

Appellant-Petitioner,

vs.

THE ATCHISON, TOPEKA AND SANTA FE RAIL-
WAY CO., et al.,

Appellees-Respondents.

On Appeal from and Writ of Certiorari to the United
States Court of Appeals for the Seventh Circuit

**REPLY BRIEF FOR APPELLANT-PETITIONER,
PARMELEE TRANSPORTATION CO.**

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**REPLY BRIEF FOR APPELLANT-PETITIONER,
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I.

**THIS COURT HAS JURISDICTION TO ENTERTAIN
THIS SUIT.**

A. On the Issue of Finality.

The appellees-respondents concede that the judgment of the court of appeals for the Seventh Circuit in this action is a final judgment for purposes of review in this Court. Appellees-respondents' Brief, pp. 10-14.

B. On the Issue of Parmelee's Standing to Maintain the Appeal.

Appellees-respondents apparently are willing to rest the test of Parmelee's standing on *Frost v. Corporation Commission*, 278 U.S. 515 (1929) and *Alton R. Co. v. United States*, 315 U.S. 15 (1942). Appellees-respondents' Brief, pp. 14-15. At the same time they suggest that the test of Parmelee's standing is whether it can prevail on the substantive issues in the case. They would thus equate the issue of jurisdiction with the issue on the merits. We are certainly willing to abide by such a test of our right to maintain this suit in this Court. It would seem, however, that here as in the district courts, issues of jurisdiction precede issues of substance. Cf. *Bell v. Hood*, 327 U. S. 678 (1940). We submit, therefore, that the *Frost* rationale supplies a basis for the maintenance of this action regardless of the outcome of this litigation. Appellees-respondents have now conceded that their operation of transfer vehicles in Chicago without a license is in violation of provisions of the Municipal Code which are validly applicable. See point II, *infra*.

II.

THE FAILURE OF TRANSFER TO APPLY FOR A LICENSE FOR ITS VEHICLE PRECLUDES ITS ATTACK ON THE CONSTITUTIONALITY OF THE ORDINANCE.

In this Court, for the first time, the appellees-respondents concede that the licensing provisions other than those contained in § 28-31 are applicable to the vehicles used by Transfer in its business. Appellees-respondents' Brief, pp. 17, 36, 46. No such licenses have been sought. Certainly, under the terms of the ordinance, the validity of which is now conceded by the appellees-respondents, the issuance of a license is not a merely ministerial act.

Application for a license is required by § 28-5, not § 28-31. See appellant-petitioner's Brief, p. 4 a. It is unlawful to operate a public passenger vehicle without such a license, by the terms of § 28-2, not § 28-31. *Ibid.* at p. 3a. Section 28-4 requires that the vehicles to be licensed be inspected "and found to be in safe operating condition and to have adequate body and seating facilities which are clean and in good repair for the comfort and convenience of passengers." *Ibid.* at p. 4a. Further specifications as to the construction of the vehicle are contained in § 28-4.1. *Ibid.* Section 28-6 requires the investigation of "the character and reputation of the applicant as a law-abiding citizen; the financial ability of the applicant to render safe and comfortable transportation service, to maintain or replace the equipment for such service and to pay all judgments and awards which may be rendered for any cause arising out of the operation of a public passenger vehicle during the license period." *Ibid.* at pp. 4a-5a. Only if the commissioner finds that the requirements are met is he to issue a license. *Ibid.* And § 28-12 requires that the licensee, to qualify, must satisfy the commissioner as to the insurance which he carries or post an adequate bond in lieu thereof. *Ibid.* at 7a. So far as this record reveals, there is no evidence that Transfer or its vehicles meet the various requirements which are prerequisite to the securing of a license. Indeed, the only evidence in the record is that vehicles operated by Transfer at the time of the filing of this suit did not meet the requirements. R. 208-209.

All this underlines the fact that the attack on the ordinance by the appellees-respondents is premature. It may be that Transfer will not be denied a license, in which event no question of the constitutionality of the statute could be raised; or it may be that Transfer will be denied

a license for failure to comply with those sections of the statute which they now concede to be applicable to them, in which event no question of constitutionality of the ordinance could be raised; or, as we have previously indicated, the denial of a license might rest on § 28-31, but grounded in the proper exercise of the state police power, in which case the constitutionality of the ordinance would not be questionable. Clearly, in this posture, the case calls for the vacation of the judgment of the court of appeals, with an order comparable to that issued in *Clark v. Poor*, 274 U. S. 554, 558 (1927), under similar circumstances:

"The decree dismissing the bill is affirmed, but without prejudice to the right of the plaintiffs to seek appropriate relief by another suit if they should thereafter be required by the Commission with conditions or provisions not warranted by law."

To do otherwise would be to bring the court into conflict with one of its long-established principles. For, as Mr. Justice Brandeis said in his opinion in *Ashwander v. T.V.A.*, 297 U.S. 288, 346-47 (1936):

"The Court will not anticipate a question of constitutional law in advance of the necessity of deciding it." . . . "It is not the habit of the Court to decide questions of a constitutional nature unless absolutely necessary to a decision of the case." (Citations omitted.)

Since, on this record, no showing is made of the need to resolve the question of the constitutionality of § 28-31, the judgment of the court of appeals should be vacated.

III.

THE APPLICATION OF SECTION 28-31 OF THE MUNICIPAL CODE OF CHICAGO IS CONSISTENT WITH THE COMMERCE CLAUSE OF THE CONSTITUTION.

It is not surprising that appellees-respondents propose to rest their case on decisions of this Court which have long since been relegated to the concern of historians. Whatever may be said on behalf of the nineteenth century doctrines at the time of their application, new circumstances have caused the Court to frame a different construction of the Commerce Clause. As this Court has said in a different context: "In approaching this problem, we cannot turn the clock back to 1868" *Brown v. Board of Education*, 347 U.S. 483, 492 (1954).

The underlying thesis of the cases and authorities relied on by appellees-respondents is best characterized by their quotation from the Report of the Committee of the House of Representatives on p. 29 of their brief: " . . . no State can constitutionally enact laws or any regulation of commerce between the States, whether Congress has exercised the same power in question or left it free." The cases cited in our main brief reject such an approach to the Commerce Clause. As this Court has had occasion to say over and over again, in recent years, interstate commerce is not immune from the proper exercise of local police power.

" . . . there are many matters which are appropriate subjects of regulation in the interest of the safety, health and well-being of local communities which, because of their local character and their number and diversity and because of the practical difficulties involved, may never be adequately dealt with by Congress. Because of their local character also there is wide scope for local regulation without impairing

the uniformity of control over the commerce in matters of national concern and without materially obstructing the free flow of commerce, which were the principal objects sought to be secured by the commerce clause. Such regulations, in the absence of supervening Congressional action, have for the most part been sustained by this Court, notwithstanding the commerce clause." *Duckworth v. Arkansas*, 314 U.S. 390, 394-95 (1941).

Certainly among those matters to which Mr. Chief Justice Stone referred in the *Duckworth* case was the control over streets and traffic by local municipalities. The quotation from *Railway Express Agency, Inc. v. New York*, 336 U.S. 106, 109-11 (1949), in our main Brief at pp. 50-51, disposes of this question.

The appellees-respondents do not show, because they cannot show, any federal law or regulation which is in conflict with the regulatory provisions of the relevant sections of the Municipal Code of Chicago. They assert that the transfer activities in question could be made the subject of regulation by the Interstate Commerce Commission. With this we have no quarrel. To the extent that the I.C.C. undertook to regulate these transfer activities, municipal regulation would be superseded. The fact is, however, that no such federal regulation has been undertaken.

Transfer is sought to be brought into the category of a "certificated carrier" by two rather transparent devices. First, it is argued that Transfer "is simply the *alter ego* of the 'railroads.'" Appellees-respondents' Brief, p. 20. A glance at the record disposes of this argument. The agreement between Transfer and the railroads makes it clear that Transfer is an independent contractor and not even an agent. Paragraph 11(f) of the contract provides:

"Transfer shall employ and direct all persons performing any service hereunder and such persons shall be and remain its sole employees and subject to its sole control and direction, *it being the intention of the parties that Transfer shall be and remain an independent contractor*. Transfer agrees to conduct the work provided for herein in its name and agrees not to display the name of any of the Terminal Lines upon or about any of its vehicles." R. 40; emphasis added.

The contract also provides that Transfer supply, own, and operate the equipment and vehicles (Par. 2 (c); R. 28); that Transfer save the railroads harmless from any and all loss or damage resulting from the operation (Par. 10(c); R. 37-38); and that "Transfer shall comply at all times with all laws, rules and regulations of governmental agencies having jurisdiction over it, and/or the services performed hereunder" (Par. 10 (k) (1); R. 40). Certainly this last clause makes it clear that the parties contemplated that governmental agencies would have power over "it", i.e. Transfer, differing from the control over the railroads. Transfer is nothing more than an independent contractor, like the butcher, the baker, and the candlestick maker, providing services for which the railroads are paying. It is not conceivable that the butcher supplying the railroads becomes immune from local zoning or health regulations because of that contract. Similarly, it is inconceivable that the railroads should have authority, by a contract, in which they protect themselves from the actions of Transfer by treating it as an independent contractor, to immunize the transfer company from the requirements of local public safety and welfare regulations.

It is argued; too, that the services performed by Transfer are really railroad services which the railroads are

required to provide because provision is made therefor in the tariffs. The fact is that neither the Interstate Commerce Act, nor the regulations issued by the I.C.C. nor the tariffs filed by the railroads require the railroads to render transfer service to through passengers in the Chicago area. It is a purely voluntary matter from which the railroads may withdraw at any time, without I.C.C. permission.

The voluntary nature of these services was recognized by the I.C.C. in *Status of Parmelee Transportation Co.*, 288 I.C.C. 95, 104 (1953), quoted in our principal Brief at pp. 38-39. It was similarly recognized by the appellees-respondents in their contract: "The Terminal Lines have found it desirable to provide a transfer service between terminal stations in Chicago, and between said stations and steamer docks." R. 26. And it is specifically recognized in the tariff itself, which provides that in Chicago "Transfer ticket (including transfer of passenger and all baggage) *may* be issued without charge . . .". R. 195; emphasis added.

Transfer is not a certificated carrier. It is not even carrying on a function which the railroads are required to provide. Transfer cannot be brought within the doctrine limiting the power of the states to require licenses of federally certificated carriers.

IV.

THE STANDARDS OF SECTION 28-31 ARE NOT LIMITED TO "ECONOMIC CRITERIA".

The case is before this Court without the assistance of the local agency's application of this ordinance. It is urged that the section is void on its face as calling for the imposition of "economic criteria" to the question whether

licenses should be issued to Transfer. Such contention rests on the thesis that, "the phrase 'public convenience and necessity' includes only the economic regulation of transportation and not any elements of the police power." Appellee-respondents' Brief, p. 39. This contention is obviously in error.

This Court has recognized that the phrase in question is an elastic one of many meanings depending on the statute and the circumstances of its application. Cf. *F.C.C. v. National Broadcasting Co.*, 347 U.S. 284, 289, n. 7 (1954). More to the point, however, is that this Court, in a context not dissimilar to the one presented by this case, has held that the phrase embodies the application of safety standards. Thus, in *Bradley v. Public Utilities Commission of Ohio*, 289 U.S. 92 (1933), the appellant, an interstate carrier, had been refused a "certificate of public convenience and necessity" (289 U.S. at 93) by a state commission. The appellant asserted that it was beyond the power of the state commission to refuse such a certificate because of the nature of appellant's business, i.e., he was engaged in interstate commerce. Mr. Justice Brandeis spoke for the Court, in the rejection of appellant's contention. And in sustaining the action of the Public Utilities Commission in denying the certificate on grounds of the police power, he said: "Safety may require that no additional vehicle be admitted to the highway. The Commerce Clause is not violated by a denial of the certificate to the appellant, if upon adequate evidence denial is deemed necessary to promote the public safety." 289 U.S. at 96. It would be difficult to find a more direct refutation of the point made by the appellees-respondents on this score.

In addition, it should be noted that the administrator charged with the enforcement of the ordinance has spe-

cifically disclaimed the power to apply economic standards under this section of the ordinance to interstate carriers. See Brief for appellant-petitioner, p. 42. See also Reply Brief of the City of Chicago in No. 103, p. 2. The ordinance is applicable to intrastate as well as interstate carriers and criteria are included which may appropriately be considered only in the issuance of licenses to carriers performing intrastate services. Moreover, the language of the section in question specifically provides that one of the criteria to be applied in determining whether to grant a license shall be "The effect of an increase in the number of such vehicles on the safety of existing vehicular and pedestrian traffic in the area of their operation," § 28-31.1 (2); appellant-petitioner's Brief, p. 17a. The amorphous nature of the test of "convenience and necessity" is further certified by the fact that the ordinance requires the commissioner to take into consideration in determining whether to grant or deny a license, "Any other facts which the commissioner may deem relevant." § 28-31.1 (4); appellant-petitioner's Brief, p. 18a.

On page 41 of their Brief, appellees-respondents seek support for their concept of "public convenience and necessity" as confined to economic considerations by arguing:

"Section 28-31.1 was copied bodily from § 28-22.1 of Chapter 28 which regulates taxicabs (R. 183-184). This section was construed by the Supreme Court of Illinois in 1947 to be a measure for the economic regulation of the taxicab business, a means of limiting the number of cabs for the purpose of limiting competition, and was held valid. *Yellow Cab Co. v. City of Chicago*, 396 Ill. 388, 71 N.E. 2d 652."

But this is not so. The Illinois Supreme Court sustained the city's power to limit the issuance of taxicab licenses under the standard of "public convenience and necessity"

not restricted to considerations of "economic regulations of the taxicab business" but as specifically including considerations of street traffic, problems of congestion, public safety and local police power requirements. The Illinois Court said, 396 Ill. 388, 71 N.E. 2d at page 657:

"Certainly, the city of Chicago, having the right to regulate traffic and parking, to build bridges, viaducts, tunnels and sewers, to select streets for through or local traffic, to levy a city vehicle tax, to provide for the underground laying of wires or other facilities in the street, and to provide for the general policing of the city, could, in the exercise of its powers conferred upon it by the legislature, properly determine the number of taxicabs which it would permit to be operated in the city of Chicago. Any conclusion other than this would render ineffective the authorizations by the legislature to the city for the regulation of traffic and parking and the policing of the city. It is well known and this court takes judicial notice of the facts that there are numerous congested areas in the city of Chicago and that the very nature of the taxicab business contributes to this traffic congestion."

And then again on page 658:

"The city council of the city of Chicago, in the exercise of its legislative discretion, could well have determined that this ordinance was a proper exercise of its police power for the regulation of the taxicab business and the regulation of the traffic and congestion upon its streets."

This authoritative interpretation is equally applicable to the similar section of the ordinance dealing with terminal vehicle licenses.

The variety of matters which may go into the application of the statutory principle of public convenience and necessity simply underline the fact that the appellee-

respondents are in no position to assert injury until such time as they can show that they have been denied a license on unconstitutional grounds. They can, of course, make no such showing until a license has been applied for, but no application has been made.

V.

THE COURT OF APPEALS ERRONEOUSLY INTERPRETED THE ORDINANCE ON THE BASIS OF ALLEGED "LEGISLATIVE HISTORY".

In their Brief, appellees-respondents assert: 1) that the reference of the court of appeals to the motives of the city council was not a factor in that court's decision, and 2) that the recourse to legislative history was proper and sustained the decision of the seventh circuit.

Both propositions are in error. But if the references impugning the motives of the city council were irrelevant to the decision, it is the more shocking that the court of appeals should indulge itself in this manner. The fact is that the "legislative history" was deemed particularly important. After quoting that portion of the ordinance which provides that the issuance of licenses should be determined, *inter alia*, on "The effect of an increase in the number of such vehicles on the safety of existing vehicles and pedestrian traffic in the area of their operation," R. 207, the court of appeals proceeded to read that provision out of the ordinance. It quoted from the appellees-respondents argument that "as a purported safety measure, this is sham and spurious." The court's conclusion was that the purpose of the city council was to control the determination of the transfer agent and not to "exercise . . . the city's police power over traffic." *Ibid*. "If there were any doubt that this conclusion is correct,

the legislative history of the ordinance dispels that doubt." *Ibid.* "The proceedings of the committee fail to indicate that the chairman or any member of the committee was interested in traffic regulations or any other aspect of the city's police power." *Ibid.*

It is respectfully submitted that this is an extraordinary and invalid method of statutory interpretation. This Court is too well acquainted with the legislative history of many statutes to be reminded that 1) where the legislation clearly states that a standard exists—here the standard of vehicular and pedestrian safety—legislative history may not be used to read such a section out of the statute; and 2) that there are many statutes enacted in which important portions of the act are not discussed in the reported committee deliberations, or in debate on the floor of the legislative body itself.

We should also point out that the so-called legislative history upon which the court of appeals relied, consisted solely of a brief informal colloquy at a committee hearing and a summarization of that colloquy. R. 90-94.

We submit that this point has been adequately answered in the Reply Brief for the City of Chicago in No. 103 at pp. 10 and 11.

Respectfully submitted,

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Office Supreme Court, U.S.

FILED

MAY 8 1957

JOHN T. PEY, Clerk

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1956 ⁷

No. ~~996~~ 104

PARMELEE TRANSPORTATION CO.,

Appellant,

vs.

THE ATCHISON, TOPEKA AND SANTA FE
RAILWAY COMPANY, ET AL.,

Appellees.

Appeal from the United States Court of Appeals
for the Seventh Circuit

APPELLEES' MOTION TO DISMISS THE APPEAL OR TO AFFIRM THE JUDGMENT

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1.

ANSWER TO APPELLANT'S PARTS I AND V

Appellant's parts I and V and much of other parts are based on the erroneous notion that the Court of Appeals held invalid all of Chapter 28 of the Chicago Municipal Code. The Court held only § 28-31.1 invalid, thus leaving in effect all of the regulatory provisions under which the interstation transfer service had been conducted for many years prior to July 26, 1955. The sole issue is the validity of § 28-31.1, and that issue presents no question of substance	4
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2.

ANSWER TO APPELLANT'S PART II

Section 28-31.1 was added to Chapter 28 on July 26, 1955, as a device to prevent the railroads from selecting an agent of their own choice to operate the interstation transfer service pursuant to authority granted them by the Interstate Commerce Act, 49 U.S.C. § 302(c)(2). It had no other purpose. This device is an invalid economic regulation of interstate commerce	8
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Since § 28-31.1 is void on its face, it was not necessary for appellees to apply for a license to conduct interstate commerce before attacking its constitutionality. Moreover, before this action was commenced, and under the issues made by the pleadings, and at all times, the City has taken the position and has advised appellees that it would enforce § 28-31.1 against appellees according to its terms..... 12

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5.

The Court of Appeals held that 49 U.S.C. § 302(c)(2) confers upon appellees the right to conduct the interstation transfer service free from any power of denial or suspension by the City. Appellant has not appealed from that ruling. That unchallenged construction requires affirmance of the judgment of the Court of Appeals..... 21

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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1956.

No. 906

PARMELEE TRANSPORTATION CO.,

Appellant,

vs.

THE ATCHISON, TOPEKA AND SANTA FE
RAILWAY COMPANY, ET AL.,

Appellees.

Appeal from the United States Court of Appeals
for the Seventh Circuit

**APPELLEES' MOTION TO DISMISS THE APPEAL
OR TO AFFIRM THE JUDGMENT**

DECISIONS BELOW

The opinion of the District Court is reported in 136 F. Supp. 476. For opinion, findings and conclusions see Tr. 99-112, 151-160.¹

The opinion of the United States Court of Appeals for Seventh Circuit is reported in 240 F. 2d 930, and is printed in appendix to statement as to jurisdiction, pp. 18a-33a.

¹ The printed transcript of record filed in the Court of Appeals has been filed in number 905 and is hereafter referred to as "Tr." Appellant's statement as to jurisdiction is hereafter referred to as "stmt. juris." and the appendices thereto as "app. to stmt. juris."

MOTION TO DISMISS THE APPEAL

Appellees move the Court to dismiss the appeal upon the ground that appellant has no standing to prosecute this separate appeal of the questions presented in the statement as to jurisdiction, pages 3-4.

Parmelee Transportation Company is the sole appellant herein. The "et al." and plurals occasionally appearing in the statement as to jurisdiction are redundancies. See signature of appellant's counsel, p. 31. The questions presented for appeal by appellant are wholly different from those presented by the petition of the City of Chicago for certiorari in cause number 905. This is in all respects a separate appeal.

Appellant was granted permissive intervention under Rule 24(b) by the District Court (Tr. 65-70), but that fact and appellant's participation in the proceedings below do not suffice to give appellant status to appeal. *City of Chicago v. Chicago Rapid Transit Co.*, 284 U.S. 577, 578 (1931).

Appellant's petition for leave to intervene in the District Court (Tr. 58-61) does not disclose any interest that would give appellant standing to appeal and there is nothing elsewhere in the record to support appellant's standing. Appellant's contract with the railroads expired on September 30, 1955 (stmt. juris. p. 7), and appellant has failed to allege or show that it will ever have another such contract. The contract for interstation transfer is entirely within the power of the railroads to award or deny; appellant cannot compel the railroads to award a contract to it and cannot interfere with the existing contract between the railroads and Transfer. *Donovan v. Pennsylvania Company*, 199 U.S. 279, 295-296 (1905); *Central Transfer Co. v. Terminal Railroad Assn.*, 288 U.S. 469 (1933).

Under these facts appellant has no standing to maintain this appeal. *City of Chicago v. Chicago Rapid Transit Co.*, *supra*, 284 U.S. 577, 578 (1931); *Perkins v. Lukens Steel Co.*, 310 U.S. 113, 125 (1940); *Singer v. Union Pacific Railroad Co.*, 311 U.S. 295 (1940); *New Orleans, M.&T.R. Co. v. Ellerman*, 105 U.S. 166, 173 (1882); *Alabama Power Co. v. Ickes*, 302 U.S. 464 (1938); *Tennessee Electric Power Co. v. Tennessee Valley Authority*, 306 U.S. 117 (1939); *Ex Parte Levitt*, 302 U.S. 633, 634 (1937). Under these authorities appellant has no separate justiciable interest that would or could be affected by decision of the questions it presents here.

Appellant is not helped by such cases as *Frost v. Corporation Commission of Oklahoma*, 278 U.S. 515 (1929), and *Alton Railroad Co. v. United States*, 315 U.S. 15 (1942). They involved the economic protection of franchise rights. Appellant claims no franchise to conduct interstate commerce and in any event the City could not grant one. Nor do cases like *Wolpe v. Poretsky*, App. D.C., 144 F. 2d 505 (1944), cert. den. 323 U.S. 777, help appellant; instead they illustrate by contrast appellant's lack of any interest that can be protected by appeal. In *The Atchison, Topeka and Santa Fe Railway Co. v. Summerfield*, App. D.C., 229 F. 2d 777 (1956), cert. den. 351 U.S. 926, justiciable interest was based on the statutory obligation of the railroads to carry all mail offered to them. The cases cited in this paragraph are fair examples of the interest required to litigate governmental questions. They illustrate clearly that appellant is conspicuously lacking in any qualification to maintain this appeal.

No right of appellant has been invaded any more than the right of the general public not to have the ordinance violated. Manifestly, appellant could not have maintained an independent suit of its own to restrain violation of the ordinance by Transfer. As the Court said in *Perkins v.*

Lukens Steel Co., supra, 310 U.S. 113, 125 (1940):

“Respondents, to have standing in court, must show an injury or threat to a particular right of their own, as distinguished from the public’s interest in the administration of the law.”

II

MOTION TO AFFIRM THE JUDGMENT

Appellees move to affirm the judgment of the Court of Appeals upon the following grounds:.

1. It is manifest that the questions on which the decision of the cause depends are so unsubstantial as not to need further argument.

2. Appellant does not present for review the construction of 49 U.S.C. § 302. (c)(2) by the Court of Appeals. Upon the basis of that unchallenged construction the Court’s judgment must be affirmed.

1.

ANSWER TO APPELLANT’S PARTS I AND V

Appellant’s parts I and V and much of other parts are based on the erroneous notion that the Court of Appeals held invalid all of Chapter 28 of the Chicago Municipal Code. The Court held only § 28-31.1 invalid, thus leaving in effect all of the regulatory provisions under which the interstation transfer service had been conducted for many years prior to July 26, 1955. The sole issue is the validity of § 28-31.1, and that issue presents no question of substance.

Appellant says (stmt. juris. p. 10) that the Court held invalid all of Chapter 28 of the Chicago Municipal Code (app. to stmt. juris. pp. 1a-17a). This is not correct. It is clear that the Court struck down only § 28-31.1 of Chapter 28 (pp. 16a-17a), thereby leaving all of the rest of Chapter

28 unaffected. See the Court's Opinion (pp. 30a-33a). The Court said (top p. 30a):

"We are thus led to conclude that there is no valid legal basis for the above-cited provisions of § 28-31.1 of the 1955 ordinance."

The words "1955 ordinance" were defined by the Court as the amendment of July 26, 1955, by footnote 13 to the Opinion (app. stmt. juris. p. 23a). The footnoted sentence further identified the amendment of 1955 as "the ordinance now under attack" (p. 23a). All of the Court's conclusions in respect to invalidity relate only to § 28-31.1.

The Court pointed out carefully (pp. 30a-32a) that all of Chapter 28 relating to terminal vehicles, except § 28-31.1, applies to and may be enforced against appellees, saying in part. (top p. 31a):

"If Transfer's vehicles do not conform to the requirements contained in the prior ordinance,²⁴ the city may refuse to issue licenses for the non-conforming vehicles and penalize their unlicensed operation in accord with § 28-32. So, also, whenever Transfer is found guilty of violating § 28-17, the City may proceed against it according to the penalties section."

²⁴ "Ch. 28, Chicago Municipal Code."

In those sentences the Court is obviously referring to live and applicable provisions. It is clear that the words "prior ordinance" do not mean something defunct. Those words were defined by the Court by footnote 10 to the Opinion to mean and to be used as a short reference to Chapter 28 as it stood before § 28-31.1 was added (app. to stmt. juris. p. 21a).

Chapter 28 had been in effect for many years before § 28-31.1 was added to it on July 26, 1955. Appellant operated under Chapter 28 before the 1955 amendment. In respect to Chapter 28 and the regulation of interstation

transfer vehicles under it before the 1955 amendment, appellant says (stmt. juris. p. 5):

"The vehicles employed have always been regarded as public passenger vehicles for hire, and have been regulated by the City of Chicago *under a comprehensive scheme for the regulation of such vehicles*. While Parmelee supplied the service it operated in compliance with the regulations prescribed by the City, and the validity of those regulations was not questioned." (Emphasis added)

The "comprehensive scheme for the regulation" of terminal vehicles, which appellant approves, remains intact. That means that the sole issue is the validity of § 28-31.1, and there is no substance to that.

Chapter 28 without § 28-31.1 embodies all general features of regulation which a state may lawfully impose upon interstate commerce: registration for identification and for purpose of enforcing valid police regulations, traffic regulations, and reasonable license fees. Section 28-31.1 attempted to add something to Chapter 28 that was not already there. The language used in § 28-31.1 was that of economic regulation which appellant concedes, foot of page 10, cannot be imposed upon interstate commerce. In our part 2 hereafter we will show that the Council enacted § 28-31.1 for the purpose stated on its face, economic regulation. In view of that clear purpose it is idle for appellant to argue that the Council intended the words it used to mean something other than what they say.

Before passing appellant's page 11 we call attention to appellant's statement that Transfer cannot obtain a certificate from the Interstate Commerce Commission and is not subject to Part II of the Interstate Commerce Act, which regulates Motor carriers. This statement is irrelevant. The interstation transfer service here involved is railroad transportation subject to Part I of the Act by force of

49 U.S.C. § 302(c)(2). This section is set out in part in the Opinion of the Court of Appeals (app. to stint. juris. pp. 25a-26a) and in full in ~~an~~ appendix hereto p. 24. Despite the conclusiveness on the issues of the Court's construction of § 302(c)(2), appellant does not mention nor discuss this section and does not bring its construction here for review. We discuss this subject more fully hereafter in our part 5, p. 21.

The cases relied upon by appellant in pages 10 to 21 do not sustain the validity of § 28-31.1; instead they show that it is invalid. Most discussed and most relied upon by appellant are *Fry Roofing Co. v. Wood*, 344 U.S. 157 (1952); *Columbia Terminals Co. v. Lambert*, D.C. Mo., 30 F. Supp. 28 (1939), aff. 309 U.S. 620; and *Clark v. Poor*, 274 U.S. 554 (1927). All of the statutory provisions held valid as actually applied in those cases are in Chapter 28 now and have been for years. But the statutory provision in each case which the opinion says would be invalid as to interstate commerce, if enforced against it as written, is precisely the content of § 28-31.1. Each case involved a statute enacted at one time and in one piece containing features which could be and features which could not be enforced against interstate commerce. And in each case the category which the court said would be invalid as to interstate commerce is precisely descriptive of § 28-31.1.

There are other important distinctions between the cases relied upon by appellant and the instant case. Section 28-31.1 was added after Chapter 28 had been long in effect. Section 28-31.1 comprised *only* economic regulation and thus was wholly different from the content of Chapter 28. Since Section 28-31.1 was all invalid as to interstate commerce the City could not avail itself of the device of claiming that it would enforce only the valid part of it. Since § 28-31.1 was a strange newcomer to Chapter 28 the Court properly viewed § 28-31.1 by itself and held it alone invalid.

leaving the City with the same "comprehensive scheme" of regulation that it had had for many years.

So arises the question, why, when the City had this "comprehensive scheme for the regulation" of terminal vehicles, which appellant indorses, did the City engraft § 28-31.1 upon it on July 26, 1955?

2.

ANSWER TO APPELLANT'S PART II

Section 28-31.1 was added to Chapter 28 on July 26, 1955, as a device to prevent the railroads from selecting an agent of their own choice to operate the interstation transfer service pursuant to authority granted them by the Interstate Commerce Act, 49 U.S.C. § 302(c)(2). It had no other purpose. This device is an invalid economic regulation of interstate commerce.

Section 28-31.1 was enacted as a device to prevent the railroads from selecting an agent of their own choice to operate the interstation transfer service, and the Court of Appeals was correct in so finding (app. to stmt. juris. p. 30a). It is idle for appellant to contend otherwise. Since more than 99 per cent of the transfers are in interstate commerce, this device is an invalid economic regulation of interstate commerce which the railroads are performing under authority of 49 U.S.C. § 302(c)(2).

The situation in early July, 1955, was that Chapter 28 provided "a comprehensive scheme for the regulation" of terminal vehicles (stmt. juris. p. 5). Sections 28-1 and 28-31 provided that no person could qualify for a terminal vehicle license unless he had a contract with railroads for transportation of passengers from terminal stations (stmt. juris. pp. 5, 7). Appellant had the only contract, was the only terminal vehicle operator, and held the only terminal vehicles licenses outstanding.

On June 13, 1955; the railroad appellees notified appellant of the termination of their contract with appellant effective September 30, 1955 (Tr. 82). On July 26, 1955, the Chicago City Council passed the 1955 ordinance (Tr. 44-45). It had three significant features. (1) It removed the requirement that the holder of a terminal vehicle license must have a contract with the railroads (stmt. juris. p. 7). (2) It provided that any new applicant for a license must prove public convenience and necessity (p. 8). (3) It authorized the "annual renewal" of appellant's existing licenses without such proof (p. 8). Features 2 and 3 were provided by new § 28-31.1 (Tr. 44-45).

Section 28-31.1 was copied from and refers to an older section of Chapter 28, section 28-22.1, which regulates the issuing of taxicab licenses. Compare the two sections (app. to stmt. juris. pp. 12a-13a and 16a-17a). Section 28-22.1, or a similar predecessor, was construed in *Yellow Cab Co. v. City of Chicago*, 396 Ill. 388, 71 N.E. 2d 652 (1947). There it was held that the power delegated to the license commissioner and the City Council to determine "public convenience and necessity" confers the absolute power to bar new applicants for taxicab licenses in order to protect existing licensees from increased competition.

"The legislature is presumed to know the construction the statute has been given and by re-enactment it is assumed that it was intended that the new statute should have the same effect," *Lamere v. Chicago*, 391 Ill. 552, 559, 63 N.E. 2d 863, 866 (1945). "The rules for the construction of an ordinance are the same as those applied in the construction of a statute," *Dean Milk Co. v. Chicago*, 385 Ill. 565, 570, 53 N.E. 2d 612, 615 (1944). The Council clearly intended, by the addition of § 28-31.1 to Chapter 28, to place the issuing of new terminal vehicle licenses under the same type of discretionary economic control as that expressed in § 28-22.1 in respect to taxicabs.

The phrase "public convenience and necessity" has no other meaning in Illinois law except economic regulation. The Supreme Court of Illinois, construing the Illinois Public Utilities Act,² holds uniformly that this phrase includes only economic regulation of carrier service, such as determination whether applicant shall be authorized to render service, determination of which one of two or more competitors shall be selected to perform the service, protection of an established carrier against the entry of new competition, determination of economic benefit to the public, and similar purely economic considerations.³ Conversely, the Illinois Court holds that "The Public Utilities Act of this State has no relation to the public health, safety or morals * * *."⁴

In view of the foregoing undisputed facts and clear decisions of Illinois law, the cases relied upon by appellant in pages 18 to 21 are not in conflict with the Court's decision here. Section 28-31.1 comprises nothing but economic regulation under the unanimous voice of Illinois authority. Therefore section 28-31.1 is not open to any possible construction as a valid police power regulation. The Illinois construction is binding here. Cases applying the construction of "public convenience and necessity" by other states cannot prevail over the Illinois construction.

This economic regulation cannot be imposed upon inter-

² Appendix hereto p. 25.

³ *Egyptian Transportation System v. Louisville and Nashville R.R. Co.*, 321 Ill. 580, 587-588, 152 N.E. 510, 512-513 (1926); *Eagle Bus Lines, Inc. v. Illinois Commerce Commission*, 3 Ill. 2d 66, 119 N.E. 2d 915 (1954); *Chicago & West Towns Railways, Inc. v. Illinois Commerce Commission*, 383 Ill. 20, 43 N.E. 2d 320 (1943); *Bartonville Bus Line v. Eagle Motor Coach Line*, 326 Ill. 200, 157 N.E. 175 (1927); *Illinois Power & Light Corp. v. Commerce Commission*, 320 Ill. 427, 151 N.E. 326 (1926); *The Commerce Commission v. Chicago Railways Company*, 362 Ill. 559, 566, 1 N.E. 2d 65, 68-69 (1936).

⁴ *Schaller Piano Co. v. Illinois Northern Utilities Co.*, 288 Ill. 580, 585-586, 123 N.E. 631, 633 (1919).

state commerce by a state. *Buck v. Kuykendall*, 267 U.S. 307, 315-316 (1925). Distinctions between invalid economic regulation of interstate commerce and valid police power regulation were pointed out in *Michigan Public Utilities Commission v. Duke*, 266 U.S. 570, 577 (1925), where the Court said in respect to economic considerations: "Clearly, these requirements have no relation to public safety or order in the use of motor vehicles on the highways * * *." Precisely the same distinction was observed in *Schiller Piano Co. v. Illinois Northern Utilities Co.*, *supra*, 288 Ill. 580, 585-586, 123 N.E. 631, 633 (1919), where the Court said: "The Public Utilities act of this State has no relation to the public health, safety or morals * * *."

Moreover, Chapter 28 before the addition of § 28-31.1 constituted, as appellant says, "a comprehensive scheme for the regulation" of terminal vehicles (stmt. juris. p. 5) including many safety regulations. Section 28-31.1 did not add any safety regulations, but it did add the entirely new feature of economic regulation. It was intended only for that purpose. "The presumption is that every amendment of a statute is made to effect some purpose." *Acme Fireworks Corp. v. Bibb*, 6 Ill. 2d 142, 117, 126 N.E. 2d 688, 690-691, 127 N.E. 2d 444 (1955). The only possible purpose of § 28-31.1 was economic regulation.

In writing the foregoing paragraph we do not overlook numbered subsection 2 of § 28-31.1 providing that one of the criteria for determining public convenience and necessity is (app. to stmt. juris. 17a):

"2. The effect of an increase in the number of such vehicles on the safety of existing vehicular and pedestrian traffic in the area of their operation."

This is copied from § 28-22.1 (app. to stmt. juris. 12a). A brief analysis demonstrates that in the context of Chapter 28 and the 1955 amendment this is not a safety measure.

Before the amendment the number of terminal vehicles was limited by former § 28-31 to the number needed by the holder of the transfer contract with the railroads (stent. juris. p. 7). The 1955 amendment removed that restriction. It authorized the automatic annual renewal of appellant's existing licenses without compliance with § 28-31.1, thus permitting perpetual operation of the same number of vehicles that appellant had operated under authority of former § 28-31. The new subsection 2 of § 28-31.1 would apply to the vehicles needed by the new holder of the contract with the railroads. So unless the amendment was designed to prevent the new contract holder from operating any vehicles, it contemplated that more terminal vehicles would be on the streets than were authorized before the amendment. A measure that increases the number of vehicles cannot claim to be a safety regulation.

3.

ANSWER TO APPELLANT'S PART III

Since § 28-31.1 is void on its face it was not necessary for appellees to apply for a license to conduct interstate commerce before attacking its constitutionality. Moreover, before this action was commenced, and under the issues made by the pleadings, and at all times, the City has taken the position and has advised appellees that it would enforce § 28-31.1 against appellees according to its terms.

Appellant argues in part III, pp. 22-26, that appellees had no standing to attack the validity of § 28-31.1 until after their application for a license had been denied. This contention has no merit.

Appellees alleged in their complaint in District Court in great detail that § 28-31.1 is invalid on its face under the Interstate Commerce Act and the Commerce Clause, that

Before commencing this action, they so advised the City; but that the City then insisted, and still insists, that it will enforce § 28-31.1 against appellees (R. 6-22, 4, 14, 15, 16). These allegations were admitted by the City's motion for summary judgment (R. 71). The City has never disclaimed this purpose and intention. The District Court dismissed appellees' complaint (Tr. 160); and the City did its utmost to obtain affirmance of that judgment in the Court of Appeals. See the City's brief in that Court, filed here, demanding, p. 59, that "The judgment of the District Court should be affirmed." The City has never disclaimed the intent to use § 28-31.1 to bar appellees' interstate transfer service.

The erroneous premise on which appellant's contention rests is disclosed by appellant's following statement (pp. 23-24):

"Among the cases which have been cited herein, not one has held unconstitutional a state statute or municipal ordinance requiring a license for interstate motor carrier operations *in the absence of an application for a license and a denial on unconstitutional grounds*. The cases holding licensing laws invalid are all cases in which the carrier followed the appropriate procedure, pursued his administrative remedies, applied for a license, made a record suitable for judicial review, and presented the reviewing court with evidence that the license had been denied or withdrawn on unconstitutional grounds. Where the carrier has sought relief by injunction or otherwise without pursuing his administrative remedies, relief has been denied." (Italics are appellant's.)

That statement is erroneous in every detail. Interstate motor carriers were granted injunctions by federal courts against enforcement of license laws, *without first applying for licenses*, on the ground that the license laws were unconstitutional, in *Barrett (Adams Express Co.) v. New*

Fork, 232 U.S. 14 (1914), and in *Michigan Public Utilities Commission v. Duke*, 266 U.S. 570 (1925), the latter being cited in the Opinion of the Court of Appeals (app. to stmt. juris. p. 24a). Interstate water carriers were granted injunctions under precisely similar facts and under precisely similar principles of law in *Sault Ste. Marie v. International Freight Co.*, 234 U.S. 333 (1914), and in *Toomer v. Witsell*, 334 U.S. 385 (1948). Intrastate motor carriers successfully attacked state motor vehicle license laws under the 14th Amendment without first applying for licenses, in non-injunction proceedings, in *Frost v. Railroad Commission of California*, 271 U.S. 583 (1926), and in *Smith v. Cahoon*, 283 U.S. 553 (1931). An interstate water carrier induced the federal courts to hold a license law invalid under the Commerce Clause without applying for a license in *St. Clair County v. Interstate Sand & Car Transfer Company*, 192 U.S. 454 (1904).

In *Smith v. Cahoon*, *supra*, 283 U.S. 553, 562, the Court said that where, as here, a statute unlawfully demands that an applicant prove public convenience and necessity it is not necessary to apply for a license before contesting the law's validity. In *Lovell v. Griffin*, 303 U.S. 444, 452-453 (1938), which involved the First Amendment, the Court said, citing *Smith v. Cahoon*, *supra*:

"As the ordinance is void on its face, it was not necessary for appellant to seek a permit under it."

In *Jones v. Opelika*, 316 U.S. 584, 599 (1942), which also involved the First Amendment, the Court said, also citing *Smith v. Cahoon*, *supra*:

"In *Lovell v. Griffin*, 303 U.S. 444, we held invalid a statute which placed the grant of a license within the discretion of the licensing authority. By this discretion the right to obtain a license was made an empty right. Therefore the formality of going through

an application was naturally not deemed a prerequisite to insistence on a constitutional right."

It is beyond question that when an ordinance is void on its face it is not necessary to apply for a license before contesting its validity. Section 28-31.1 is void on its face. It requires that before engaging in interstate commerce under authority of 49 U.S.C. 302(c)(2) appellees must apply for a license and prove public convenience and necessity (app. to stint. juris. pp. 16a-17a). Section 28-31.1 has no other purpose whatsoever. Before the amendment of July 26, 1955, appellees could have obtained a license and complied with Chapter 28. Section 28-31.1 closed that door. Since § 28-31.1 supplanted the prior application requirements, it must be construed to change those requirements according to its precise language. Respondents either had to submit to its unlawful restraints upon interstate commerce or ask the Court to enjoin its threatened enforcement.

In *Smith v. Cahoon*, *supra*, 283 U.S. 553, the state urged that the Court leave undisturbed the statute requiring proof of public convenience and necessity, with the understanding that when application was made for a certificate the state would sift out the invalid from the valid requirements and would invoke only those provisions which in its judgment were "legally applicable." Appellant seems to be making a precisely similar proposal in the instant case. This Court held that the carrier could not be required to submit to such haphazard administration of his constitutional rights, 283 U.S. pp. 563-566.

ANSWER TO APPELLANT'S PART IV

The legislative history of § 28-31.1 was made relevant, if not independently so, by the insistence of the City and appellant that § 28-31.1 should be given a construction different from its plain terms. In such a case the official minutes of the Chicago City Council Committee are admissible to prove legislative intent.

Appellant's argument and authorities under its part IV, pp. 26-29, are not apposite. The cases cited did not involve the use of competent and relevant materials of legislative history to prove legislative intent. The rule applicable here was stated in *United States v. International Union U.A.W.*, 352 U.S. 567, 570 (1957):

"Appreciation of the circumstances that begot this statute is necessary for its understanding" * * *

In *City of Rockford v. Schultz*, 296 Ill. 254, 257, 129 N.E. 865, 866 (1921) the Court said, in words closely applicable to the instant case:

"The object in construing a statute is to ascertain and give effect to the legislative intent, and to that end the whole act, the law existing prior to its passage, any changes in the law made by the act, and the apparent motive for making such changes, will be weighed and considered." (Emphasis added.)

There the Supreme Court of Illinois resorted to the report of a special committee of the legislature to ascertain "the apparent motive" in amending a statute.

In *Dean Milk Co. v. Chicago*, 385 Ill. 565, 570, 53 N.E. 2d 612, 615 (1944), the Court said:

"The rules for the construction of an ordinance are the same as those applied in the construction of a statute."

The Court considered a large amount of extrinsic legisla-

tive history and testimony of expert witnesses to determine the meaning of the ordinance, citing the foregoing as justification for such procedure.

In *People v. Olympic Hotel Bldg. Corp.*, 405 Ill. 440, 445, 91 N.E. 2d 597, 600 (1950), the Court said:

"Resort to explanatory legislative history has been declared not to be forbidden no matter how clear the words may first appear on superficial examination. (*Harrison v. Northern Trust Co.*, 317 U.S. 476.)"

In the case cited in the foregoing excerpt this Court made the statement attributed to it in consulting the report of a committee.

In *Boshuizen v. Thompson & Taylor Co.*, 360 Ill. 160, 163, 195 N.E. 625, 626 (1935), the Court said:

"For the purpose of passing upon the construction, validity or constitutionality of a statute the court may resort to public official documents, public records, both State and national, and may take judicial notice of and consider the history of the legislation and the surrounding facts and circumstances in connection therewith."

The Court of Appeals did not attribute "to the City Council improper motives" (stmt. juris. p. 26). The Court quoted verbatim official legislative records of the City, the Council Committee minutes. These minutes state clearly the Committee's legislative intent, and neither appellant nor anyone else has attempted to claim that the minutes do not say what the Court said they say. These minutes are "the only lawful evidence of the action to which they refer," *Western Sand & Gravel Corp. v. Town of Cornwall*, 2 Ill. 2d 560, 564, 119 N.E. 2d 261, 264 (1954).

Appellant here (stmt. juris. pp. 10-11) and in the Court of Appeals (appellees' brief pp. 52-58) contends that the words "public convenience and necessity" have a meaning

different from that accorded them by the Supreme Court of Illinois. While the legislative history seems independently relevant, appellant's contention makes it so under the narrowest possible construction of the principle of resort to legislative history.

The legislative history confirms what is shown by the textual evolution and plain language of § 28-31.1. On June 13, 1955, the railroads notified appellant that their contract with appellant would end on September 30, 1955 (Tr. 82). Appellant transmitted this information to the Chairman of the Committee on Local Transportation of the Chicago City Council (Tr. 93). On June 16, 1955, the Chairman drafted and introduced in the Council a proposed ordinance which would give appellant a ten-year exclusive franchise to transfer railroad passengers to and from railroad stations (Tr. 85-89, 93-95, 44). The following is from the official minutes of the meeting of July 21, 1955, of the Council Committee, duly certified by the City Clerk (Tr. 93-94):

"The committee then took up for consideration item No. 2 on the agenda—a proposed ordinance granting authority for and licensing the operation of terminal vehicles within the City of Chicago.

"Chairman Sheridan stated that recently he was advised by the Vehicle License Commissioner that he had received a communication from the Parmelee Transportation Company advising that its contract with the railroads was to be cancelled out in September of this year, which would make it appear that the railroads were taking the position of dictating who would or could operate terminal vehicles in Chicago; that he did not think that was right and had prepared an ordinance with the assistance of Mr. Gross, and had it introduced in the City Council and referred to the committee; that subsequently, he had discussed said ordinance with Mr. Grossman of the Corporation Counsel's office, and that as a result of his conference

with Mr. Grossman, it would appear that while he—Chairman Sheridan—was on the right track in the matter, his method of approach was wrong.

“Mr. Grossman, who was present at the request of the committee, stated that he had looked over the ordinance as introduced by Chairman Sheridan and is of the opinion that the ordinance is not in proper form; but that he believes the objective can be obtained in some other way. He said he would endeavor to prepare and submit an ordinance on this subject to the committee before the next meeting.”

“At the suggestion of Chairman Sheridan, the committee voted to hold a recessed session Tuesday morning, July 26, 1955, at 9:00 o'clock for the purpose of considering such ordinance as Mr. Grossman may submit.”

A reporter's transcript of this meeting, not identified as a record of the City, contains the following (Tr. 91):

“Mr. Grossman: The ordinance that was presented to me for consideration yesterday, or the day before yesterday, I examined very carefully, and I don't think that it is within the corporate power of the City of Chicago, but the objective can be obtained in some other way, I think, without conflicting with our charter powers, and I had a conference with some of the members this afternoon, and proposed an approach which I think we can work out between now and the next meeting of the City Council.”

The following is the official minutes of the meeting of July 26, 1955, of the Council Committee (Tr. 95):

“Chairman Sheridan stated that this recessed session was being held to receive a report from Mr. Grossman on the proposed ordinance (referred June 16, 1955) granting authority for and licensing the operation of terminal vehicles within the City of Chicago. He said that Mr. Grossman had prepared a substitute ordinance which would accomplish what the committee had in mind, namely, placing the licensing and opera-

tion of terminal vehicles under the complete control of the City of Chicago, whereas as the Code now provides, the only one who can secure a license for the operation of a terminal vehicle is someone who has a contract with the railroads.

"Alderman Burmeister moved that the committee recommend to the City Council that it pass the proposed substitute ordinance drafted by Mr. Grossman.

"Alderman McGrath seconded the motion.

"The motion prevailed."

The substitute ordinance so drafted and recommended for passage was passed by the Council on July 26, 1955, and is what is referred to as the "1955 amendment" or "1955 ordinance" containing *inter alia* § 28-31.1 (Tr. 44-45). Section 28-31.1 was copied from a taxicab section of Chapter 28. See part 2 hereof, p. 8.

Answering the argument that § 28-31.1 embodied only valid police power regulation (app. to stmt. juris. 28a-29a), the Court of Appeals said in part (30a):

"At meetings of the committee which recommended the 1955 ordinance for passage, the committee chairman made it clear that the objective sought was the assumption by the city of the authority to designate the instrumentality which was to operate terminal vehicles between railroad stations in Chicago. The proceedings of the committee fail to indicate that the chairman or any member of the committee was interested in traffic regulations or any other aspect of the city's police power."

5.

The Court of Appeals held that 49 U.S.C. § 302(c)(2) confers upon appellees the right to conduct the interstation transfer service free from any power of denial or suspension by the City. Appellant has not appealed from that ruling. That unchallenged construction requires affirmance of the judgment of the Court of Appeals.

Appellant's statement as to jurisdiction does not mention or refer in any way to 49 U.S.C. § 302(c)(2), despite the Court's holding that this statute confers upon appellees the right to conduct the interstation transfer service free from any power of denial or suspension by the City. Section 302(c) is set out in essential part in the Court's opinion (app. to stmt. juris. pp. 25a-26a) and in full in the appendix hereto p. 24. Appellant does not mention, discuss, or question the Court's construction of § 302(c)(2) and its effect upon the issues (pp. 25a-28a, 30a-31a).

Appellant thus has not presented for review the Court's construction of 49 U.S.C. § 302(c)(2). Supreme Court Rule 15, paragraph 1, subparagraphs (c)(1) and (f). That unchallenged construction requires affirmance of the judgment.

By force of § 302(c)(2), the interstate interstation transfer service (more than 99 per cent of the total) performed under the contract between the railroads and Transfer is "considered to be performed" by the railroads "as part of, and shall be regulated in the same manner as, the transportation by railroad * * * to which such services are incidental." The service is performed pursuant to tariffs filed with the Interstate Commerce Commission by the railroads (Tr. 74-81; Rheintgen Affidavit).

Section 302(c)(2) grants to the railroads rights to perform transfer between terminals by motor vehicle which are at least equal in status to the rights conferred by a certificate issued under 49 U.S.C. § 307. Compare the de-

cisions of the Interstate Commerce Commission in *Pick-Up of Livestock in Illinois, Iowa and Wisconsin*; before the enactment of § 302(c)(2), in 238 I.C.C. 671, 678 (1940); and after its enactment, in 248 I.C.C. 385, 397 (1942). The Commission can, by force of § 302(c), compel railroads to perform interstation transfer service, *Cartage Rail to Steamship Lines at New York*, 269 I.C.C. 199, 200 (1947). While the Commission cannot deny or suspend operations being performed within the lawful limits of § 302(c), the Commission alone has the power to deny or suspend operations not lawful under that section. *New York S.&W.R.Co. Application*, 46 M.C.C. 713 (1946); *Movement of Highway Trailers by Rail*, 293 I.C.C. 93, 97-103 (1954); *Trailers on Flatcars, Eastern Territory*, 296 I.C.C. 219 (1955).

The Court therefore held that the rights conferred by 49 U.S.C. § 302(c) are equal in status to those conferred by a certificate under 49 U.S.C. § 307, and that the rule of *Castle v. Hayes Freight Lines*, 348 U.S. 61 (1954), applies to the interstation transfer service here involved (app. to stmt. juris. pp. 30a-31a).

That construction of § 302(c) is obviously correct. Neither appellant here, nor the City of Chicago in No. 905, has questioned it.

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CONCLUSION

The appeal should be dismissed, or the judgment should be affirmed.

Respectfully submitted,

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APPENDIX

SECTION 202 (c) OF THE INTERSTATE COMMERCE ACT,
49 U.S.C. §302 (c).

(c) Notwithstanding any provision of this section or of section 203, the provisions of this part, except the provisions of section 204 relative to qualifications and maximum hours of service of employees and safety of operation and equipment, shall not apply—

(1) to transportation by motor vehicle by a carrier by railroad subject to part I, or by a water carrier subject to part III, or by a freight forwarder subject to part IV, incidental to transportation or service subject to such parts, in the performance within terminal areas of transfer, collection, or delivery services; but such transportation shall be considered to be, and shall be regulated as transportation subject to part I when performed by such carrier by railroad, as transportation subject to part III when performed by such water carrier, and as transportation or service subject to part IV when performed by such freight forwarder;

(2) to transportation by motor vehicle by any person (whether as agent or under a contractual arrangement) for a common carrier by railroad subject to part I, an express company subject to part I, a motor carrier subject to this part, a water carrier subject to part III, or a freight forwarder subject to part IV, in the performance within terminal areas of transfer, collection, or delivery service; but such transportation shall be considered to be performed by such carrier, express company, or freight forwarder as part of, and shall be regulated in the same manner as, the transportation by railroad, express, motor vehicle, or water, or the freight forwarder transportation or service, to which such services are incidental.

ILLINOIS REVISED STATUTES, 1955, CH. 111½, § 56, LAWS OF
1913, P. 460, LAWS OF 1921, P. 731.

§ 55. *Certificate of convenience and necessity—Alteration.*

No public utility shall begin the construction of any new plant equipment, property or facility which is not in substitution of any existing plant, equipment, property or facility or in extension thereof or in addition thereto, unless and until it shall have obtained from the Commission a certificate that public convenience and necessity require such construction.

No public utility not owning any city or village franchise nor engaged in performing any public service or in furnishing any product or commodity within this State and not possessing a certificate of public convenience and necessity from the State Public Utilities Commission or the Public Utilities Commission, at the time this Act goes into effect shall transact any business in this State until it shall have obtained a certificate from the Commission that public convenience and necessity require the transaction of such business.

Whenever after a hearing the Commission determines that any new construction or the transaction of any business by a public utility will promote the public convenience and is necessary thereto, it shall have the power to issue certificates of public convenience and necessity.

MAY 10 1957

JOHN T. FEY, Clerk

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1956

No. ~~906~~ 104

PARMELINE TRANSPORTATION CO.,

Petitioner,

vs.

THE ATCHISON, TOPEKA AND SANTA FE
RAILWAY COMPANY, ET AL.,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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1.

ANSWER TO PETITIONER'S PARTS I AND V

Petitioner's parts I and V and much of other parts are based on the erroneous notion that the Court of Appeals held invalid all of Chapter 28 of the Chicago Municipal Code. The Court held only § 28-31.1 invalid, thus leaving in effect all of the regulatory provisions under which the interstation transfer service had been conducted for many years prior to July 26, 1955. The sole issue is the validity of § 28-31.1, and that issue presents no question of substance

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2.

ANSWER TO PETITIONER'S PART II

Section 28-31.1 was added to Chapter 28 on July 26, 1955, as a device to prevent the railroads from selecting an agent of their own choice to operate the interstation transfer service pursuant to authority granted them by the Interstate Commerce Act, 49 U.S.C. § 302(c)(2). It had no other purpose. This device is an invalid economic regulation of interstate commerce

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ANSWER TO PETITIONER'S PART III

Since § 28-31.1 is void on its face, it was not necessary for respondents to apply for a license to conduct interstate commerce before attacking its constitutionality. Moreover, before this action was commenced, and under the issues made by the pleadings, and at all times, the City has taken the position and has advised respondents that it would enforce § 28-31.1 against respondents according to its terms.

ANSWER TO PETITIONER'S PART IV

The legislative history of § 28-31.1 was made relevant, if not independently so, by the insistence of the City and petitioner that § 28-31.1 should be given a construction different from its plain terms. In such a case the official minutes of the Chicago City Council Committee are admissible to prove legislative intent.

The Court of Appeals held that 49 U.S.C. § 302(c)(2) confers upon respondents the right to conduct the interstation transfer service free from any power of denial or suspension by the City. Petitioner has not asked review of ruling. That unchallenged construction requires affirmance of the judgment of the Court of Appeals

Conclusion/

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Interstate Commerce Act, 49 U.S.C. § 302(c)
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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1956

No. 906

PARMELEE TRANSPORTATION CO.,
Petitioner,

vs.

THE ATCHISON, TOPEKA AND SANTA FE
RAILWAY COMPANY, ET AL.,
Respondents.

**RESPONDENTS' BRIEF IN OPPOSITION TO
PETITION FOR CERTIORARI**

DECISIONS BELOW

The opinion of the District Court is reported in 136 F. Supp. 476. For opinion, findings and conclusions see Tr. 99-112, 151-160.¹

The opinion of the United States Court of Appeals for Seventh Circuit is reported in 240 F. 2d 930, and is printed in appendix to statement as to jurisdiction, pp. 18a-33a.

¹The printed transcript of record filed in the Court of Appeals has been filed in number 905 and is hereafter referred to as "Tr."

RELATION OF APPEAL AND CERTIORARI PROCEEDINGS

Parmelee Transportation Company filed a statement as to jurisdiction and a petition for certiorari which are identical in substance. In response we filed a motion to dismiss the appeal or to affirm the judgment and this brief in opposition to certiorari which are also identical in substance. We suggest that it is not necessary for the Court to read both of our documents, since a complete understanding of our position may be obtained by reading one.

PETITIONER LACKS STANDING TO SEEK CERTIORARI

Petitioner was granted permissive intervention under Rule 24(b) by the District Court (Tr. 65-70), but that fact and petitioner's participation in the proceedings below do not suffice to give petitioner status to seek review here. *City of Chicago v. Chicago Rapid Transit Co.*, 284 U.S. 577, 578 (1931).

Petitioner's petition for leave to intervene in the District Court (Tr. 58-61) does not disclose any interest that would give petitioner standing here and there is nothing elsewhere in the record to support petitioner's standing. Petitioner's contract with the railroads expired on September 30, 1955 (petition p. 6), and petitioner has failed to allege or show that it will ever have another such contract. The contract for interstation transfer is entirely within the power of the railroads to award or deny; petitioner cannot compel the railroads to award a contract to it and cannot interfere with the existing contract between the railroads and Transfer. *Donovan v. Pennsylvania Company*, 199 U.S. 279, 295-296 (1905); *Central Transfer Co. v. Terminal Railroad Assn.*, 288 U.S. 469 (1933).

Under these facts petitioner has no standing to seek review here. *City of Chicago v. Chicago Rapid Transit Co.*,

supra, 284 U.S. 577, 578 (1931); *Perkins v. Lukens Steel Co.*, 310 U.S. 113, 125 (1940); *Singer v. Union Pacific Railroad Co.*, 311 U.S. 295 (1940); *New Orleans, M.&T.R. Co. v. Ellerman*, 105 U.S. 166, 173 (1882); *Alabama Power Co. v. Ickes*, 302 U.S. 464 (1938); *Tennessee Electric Power Co. v. Tennessee Valley Authority*, 306 U.S. 117 (1939); *Ex Parte Levitt*, 302 U.S. 633, 634 (1937). Under these authorities petitioner has no separate justiciable interest that would or could be affected by decision of the questions it presents here.

Petitioner is not helped by such cases as *Frost v. Corporation Commission of Oklahoma*, 278 U.S. 515 (1929), and *Alton Railroad Co. v. United States*, 315 U.S. 15 (1942). They involved the economic protection of franchise rights. Petitioner claims no franchise to conduct interstate commerce and in any event the City could not grant one. Nor do cases like *Wolpe v. Foretsky*, App. D.C., 144 F. 2d 505 (1944), cert. den. 323 U.S. 777, help petitioner; instead they illustrate by contrast petitioner's lack of any interest that can be protected by review. In *The Atchison, Topeka and Santa Fe Railway Co. v. Summerfield*, App. D.C., 229 F. 2d 777 (1956), cert. den. 351 U.S. 926, justiciable interest was based on the statutory obligation of the railroads to carry all mail offered to them. The cases cited in this paragraph are fair examples of the interest required to litigate governmental questions. They illustrate clearly that petitioner is conspicuously lacking in any qualification to seek review.

No right of petitioner has been invaded any more than the right of the general public not to have the ordinance violated. Manifestly, petitioner could not have maintained an independent suit of its own to restrain violation of the ordinance by Transfer. As the Court said in *Perkins v. Lukens Steel Co.*, *supra*, 310 U.S. 113, 125 (1940):

"Respondents, to have standing in court, must show an injury or threat to a particular right of their own, as distinguished from the public's interest in the administration of the law."

II

PETITIONER HAS NOT STATED ADEQUATE REASONS FOR GRANTING THE WRIT

We address this part of the brief to the "Reasons For Granting the Writ," stated in parts I to V, pp. 9 to 30.

I.

ANSWER TO PETITIONER'S PARTS I AND V

Petitioner's parts I and V and much of other parts are based on the erroneous notion that the Court of Appeals held invalid all of Chapter 28 of the Chicago Municipal Code. The Court held only § 28-31.1 invalid, thus leaving in effect all of the regulatory provisions under which the interstation transfer service had been conducted for many years prior to July 26, 1955. The sole issue is the validity of § 28-31.1, and that issue presents no question of substance.

Petitioner says (petition p. 9) that the Court held invalid all of Chapter 28 of the Chicago Municipal Code (app. to petition pp. 1a-17a). This is not correct. It is clear that the Court struck down only § 28-31.1 of Chapter 28 (pp. 16a-17a), thereby leaving all of the rest of Chapter 28 unaffected. See the Court's Opinion (pp. 30a-33a). The Court said (top p. 30a):

"We are thus led to conclude that there is no valid legal basis for the above-cited provisions of § 28-31.1 of the 1955 ordinance."

The words "1955 ordinance" were defined by the Court as the amendment of July 26, 1955, by footnote 13 to the

Opinion (app. to petition p. 23a). The footnoted sentence further identified the amendment of 1955 as "the ordinance now under attack" (p. 23a). All of the Court's conclusions in respect to invalidity relate only to § 28-31.1.

The Court pointed out carefully (pp. 30a-32a) that all of Chapter 28 relating to terminal vehicles, except § 28-31.1, applies to and may be enforced against respondents, saying in part..(top p. 31a):

"If Transfer's vehicles do not conform to the requirements contained in the prior ordinance,²⁴ the city may refuse to issue licenses for the non-conforming vehicles and penalize their unlicensed operation in accord with § 28-32. So, also, whenever Transfer is found guilty of violating § 28-17, the City may proceed against it according to the penalties section."

²⁴ "Ch. 28, Chicago Municipal Code."

In those sentences the Court is obviously referring to live and applicable provisions. It is clear that the words "prior ordinance" do not mean something defunct. Those words were defined by the Court by footnote 10 to the Opinion to mean and to be used as a short reference to Chapter 28 as it stood before § 28-31.1 was added (app. to petition p. 21a).

Chapter 28 had been in effect for many years before § 28-31.1 was added to it on July 26, 1955. Petitioner operated under Chapter 28 before the 1955 amendment. In respect to Chapter 28 and the regulation of interstation transfer vehicles under it before the 1955 amendment, petitioner says (petition p. 4):

"The vehicles employed have always been regarded as public passenger vehicles for hire, and have been regulated by the City of Chicago *under a comprehensive scheme for the regulation of such vehicles*. While Parmelee supplied the service it operated in compliance with the regulations prescribed by the City, and

the validity of those regulations was not questioned."
(Emphasis added)

The "comprehensive scheme for the regulation" of terminal vehicles, which petitioner approves, remains intact. That means that the sole issue is the validity of § 28-31.1, and there is no substance to that.

Chapter 28 without § 28-31.1 embodies all general features of regulation which a state may lawfully impose upon interstate commerce: registration for identification and for purpose of enforcing valid police regulations, traffic regulations, and reasonable license fees. Section 28-31.1 attempted to add something to Chapter 28 that was not already there. The language used in § 28-31.1 was that of economic regulation which petitioner concedes, foot of page 9, cannot be imposed upon interstate commerce. In our part 2 hereafter we will show that the Council enacted § 28-31.1 for the purpose stated on its face, economic regulation. In view of that clear purpose it is idle for petitioner to argue that the Council intended the words it used to mean something other than what they say.

Before passing petitioner's page 10 we call attention to petitioner's statement that Transfer cannot obtain a certificate from the Interstate Commerce Commission and is not subject to Part II of the Interstate Commerce Act, which regulates Motor carriers. This statement is irrelevant. The interstation transfer service here involved is railroad transportation subject to Part I of the Act by force of 49 U.S.C. § 302(c)(2). This section is set out in part in the Opinion of the Court of Appeals (app. to petition, pp. 25a-26a) and in full in appendix hereto p. 23. Despite the conclusiveness on the issues of the Court's construction of § 302(c)(2), petitioner does not mention nor discuss this section and does not bring its construction here for review. We discuss this subject more fully hereafter in our part 5, p. 20.

The cases relied upon by petitioner in pages 9 to 20 do not sustain the validity of § 28-31.1; instead they show that it is invalid. Most discussed and most relied upon by petitioner are *Fry Roofing Co. v. Wood*, 344 U.S. 157 (1952); *Columbia Terminals Co. v. Lambert, D.C. Mo.*, 30 F. Supp. 28 (1939), aff. 309 U.S. 620; and *Clark v. Poor*, 274 U.S. 554 (1927). All of the statutory provisions held valid as actually applied in those cases are in Chapter 28 now and have been for years. But the statutory provision in each case which the opinion says would be invalid as to interstate commerce, if enforced against it as written, is precisely the content of § 28-31.1. Each case involved a statute enacted at one time and in one piece containing features which could be and features which could not be enforced against interstate commerce. And in each case the category which the court said would be invalid as to interstate commerce is precisely descriptive of § 28-31.1.

There are other important distinctions between the cases relied upon by petitioner and the instant case. Section 28-31.1 was added after Chapter 28 had been long in effect. Section 28-31.1 comprised *only* economic regulation and thus was wholly different from the content of Chapter 28. Since Section 28-31.1 was all invalid as to interstate commerce the City could not avail itself of the device of claiming that it would enforce *only* the valid part of it. Since § 28-31.1 was a strange newcomer to Chapter 28 the Court properly viewed § 28-31.1 by itself and held it alone invalid, leaving the City with the same "comprehensive scheme" of regulation that it had had for many years.

So arises the question, why, when the City had this "comprehensive scheme for the regulation" of terminal vehicles, which petitioner indorses, did the City engraft § 28-31.1 upon it on July 26, 1955?

ANSWER TO PETITIONER'S PART II

Section 28-31.1 was added to Chapter 28 on July 26, 1955, as a device to prevent the railroads from selecting an agent of their own choice to operate the interstation transfer service pursuant to authority granted them by the Interstate Commerce Act, 49 U.S.C. § 302(c)(2). It had no other purpose. This device is an invalid economic regulation of interstate commerce.

Section 28-31.1 was enacted as a device to prevent the railroads from selecting an agent of their own choice to operate the interstation transfer service, and the Court of Appeals was correct in so finding (app. to petition, p. 30a). It is idle for petitioner to contend otherwise. Since more than 99 per cent of the transfers are in interstate commerce, this device is an invalid economic regulation of interstate commerce which the railroads are performing under authority of 49 U.S.C. § 302(c)(2).

The situation in early July, 1955, was that Chapter 28 provided "a comprehensive scheme for the regulation" of terminal vehicles (petition p. 4). Sections 28-1 and 28-31 provided that no person could qualify for a terminal vehicle license unless he had a contract with railroads for transportation of passengers from terminal stations (petition pp. 5, 7). Petitioner had the only contract, was the only terminal vehicle operator, and held the only terminal vehicle licenses outstanding.

On June 13, 1955, the railroad appellees notified petitioner of the termination of their contract with petitioner effective September 30, 1955 (Tr. 82). On July 26, 1955, the Chicago City Council passed the 1955 ordinance (Tr. 44-45). It had three significant features. (1) It removed the requirement that the holder of a terminal vehicle license must have a contract with the railroads (petition p. 6). (2) It provided that any new applicant for a license must prove

public convenience and necessity (p. 7). (3) It authorized the "annual renewal" of petitioner's existing licenses without such proof (p. 7). Features 2 and 3 were provided by new § 28-31.1 (Tr. 44-45).

Section 28-31.1 was copied from and refers to an older section of Chapter 28, section 28-22.1, which regulates the issuing of taxicab licenses. Compare the two sections (app. to petition pp. 12a-13a and 16a-17a). Section 28-22.1, or a similar predecessor, was construed in *Yellow Cab Co. v. City of Chicago*, 396 Ill. 388, 71 N.E. 2d 652 (1947). There it was held that the power delegated to the license commissioner and the City Council to determine "public convenience and necessity" confers the absolute power to bar new applicants for taxicab licenses in order to protect existing licensees from increased competition.

"The legislature is presumed to know the construction the statute has been given and by re-enactment it is assumed that it was intended that the new statute should have the same effect," *Lamere v. Chicago*, 391 Ill. 552, 559, 63 N.E. 2d 863, 866 (1945). "The rules for the construction of an ordinance are the same as those applied in the construction of a statute," *Dean Milk Co. v. Chicago*, 385 Ill. 565, 570, 53 N.E. 2d 612, 615 (1944). The Council clearly intended, by the addition of § 28-31.1 to Chapter 28, to place the issuing of new terminal vehicle licenses under the same type of discretionary economic control as that expressed in § 28-22.1 in respect to taxicabs.

The phrase "public convenience and necessity" has no other meaning in Illinois law except economic regulation. The Supreme Court of Illinois, construing the Illinois Public Utilities Act,² holds uniformly that this phrase includes only economic regulation of carrier service, such as determination whether applicant shall be authorized to render

² Appendix hereto p. 24.

service, determination of which one of two or more competitors shall be selected to perform the service, protection of an established carrier against the entry of new competition, determination of economic benefit to the public, and similar purely economic considerations.³ Conversely, the Illinois Court holds that "The Public Utilities Act of this State has no relation to the public health, safety or morals * * *."⁴

In view of the foregoing undisputed facts and clear decisions of Illinois law the cases relied upon by petitioner in pages 17 to 20 are not in conflict with the Court's decision here. Section 28-31.1 comprises nothing but economic regulation under the unanimous voice of Illinois authority. Therefore section 28-31.1 is not open to any possible construction as a valid police power regulation. The Illinois construction is binding here. Cases applying the construction of "public convenience and necessity" by other states cannot prevail over the Illinois construction.

This economic regulation cannot be imposed upon interstate commerce by a state. *Buck v. Kykendall*, 267 U.S. 307, 315-316 (1925). Distinctions between invalid economic regulation of interstate commerce and valid police power regulation were pointed out in *Michigan Public Utilities Commission v. Duke*, 266 U.S. 570, 577 (1925), where the Court said in respect to economic considerations: "Clearly, these requirements have no relation to public safety or order in the use of motor vehicles on the highways * * *."

³ *Egyptian Transportation System v. Louisville and Nashville R.R. Co.*, 321 Ill. 580, 587-588, 152 N.E. 510, 512-513 (1926); *Eagle Bus Lines, Inc. v. Illinois Commerce Commission*, 3 Ill. 2d 66, 119 N.E. 2d 915 (1954); *Chicago & West Towns Railways, Inc. v. Illinois Commerce Commission*, 383 Ill. 20, 43 N.E. 2d 320 (1943); *Bartonville Bus Line v. Eagle Motor Coach Line*, 326 Ill. 200, 157 N.E. 175 (1927); *Illinois Power & Light Corp. v. Commerce Commission*, 320 Ill. 427, 151 N.E. 326 (1926); *The Commerce Commission v. Chicago Railways Company*, 362 Ill. 559, 566, 1 N.E. 2d 65, 68-69 (1936).

⁴ *Schiller Piano Co. v. Illinois Northern Utilities Co.*, 288 Ill. 580, 585-586, 123 N.E. 631, 633 (1919).

Precisely the same distinction was observed in *Schiller Piano Co. v. Illinois Northern Utilities Co.*, *supra*, 288 Ill. 580, 585-586, 123 N.E. 631, 633 (1919), where the Court said: "The Public Utilities act of this State has no relation to the public health, safety or morals * * *."

Moreover, Chapter 28 before the addition of § 28-31.1 constituted, as petitioner says, "a comprehensive scheme for the regulation" of terminal vehicles (petition p. 4) including many safety regulations. Section 28-31.1 did not add any safety regulations, but it did add the entirely new feature of economic regulation. It was intended only for that purpose. "The presumption is that every amendment of a statute is made to effect some purpose." *Acme Fire-works Corp. v. Bibb*, 6 Ill. 2d 112, 117, 126 N.E. 2d 688, 690-691, 127 N.E. 2d 444 (1955). The only possible purpose of § 28-31.1 was economic regulation.

In writing the foregoing paragraph we do not overlook numbered subsection 2 of § 28-31.1 providing that one of the criteria for determining public convenience and necessity is (app. to petition, 17a):

"2. The effect of an increase in the number of such vehicles on the safety of existing vehicular and pedestrian traffic in the area of their operation."

This is copied from § 28-22.1 (app. to petition, 12a). A brief analysis demonstrates that in the context of Chapter 28 and the 1955 amendment this is not a safety measure. Before the amendment the number of terminal vehicles was limited by former § 28-31 to the number needed by the holder of the transfer contract with the railroads (petition p. 6). The 1955 amendment removed that restriction. It authorized the automatic annual renewal of petitioner's existing licenses without compliance with § 28-31.1, thus permitting perpetual operation of the same number of vehicles that petitioner had operated under authority of

former § 28-31. The new subsection 2 of § 28-31.1 would apply to the vehicles needed by the new holder of the contract with the railroads. So, unless the amendment was designed to prevent the new contract holder from operating any vehicles, it contemplated that more terminal vehicles would be on the streets than were authorized before the amendment. A measure that increases the number of vehicles cannot claim to be a safety regulation.

3.

ANSWER TO PETITIONER'S PART III

Since § 28-31.1 is void on its face it was not necessary for respondents to apply for a license to conduct interstate commerce before attacking its constitutionality. Moreover, before this action was commenced, and under the issues made by the pleadings, and at all times, the City has taken the position and has advised respondents that it would enforce § 28-31.1 against respondents according to its terms.

Petitioner argues in part III, pp. 21-25, that respondents had no standing to attack the validity of § 28-31.1 until after their application for a license had been denied. This contention has no merit.

Respondents alleged in their complaint in District Court in great detail that § 28-31.1 is invalid on its face under the Interstate Commerce Act and the Commerce Clause, that, before commencing this action they so advised the City, but that the City then insisted, and still insists, that it will enforce § 28-31.1 against respondents (R. 6-22, §§ 4, 14, 15, 16). These allegations were admitted by the City's motion for summary judgment (R. 71). The City has never disclaimed this purpose and intention. The District Court dismissed respondents' complaint (Tr. 160), and the City did its utmost to obtain affirmance of that judgment in the Court of

Appeals. See the City's brief in that Court, filed here, demanding, p. 59, that "The judgment of the District Court should be affirmed." The City has never disclaimed the intent to use § 28-31.1 to bar respondents' interstation transfer service.

The erroneous premise on which petitioner's contention rests is disclosed by petitioner's following statement (pp. 22-23):

"Among the cases which have been cited herein, not one has held unconstitutional a state statute or municipal ordinance requiring a license for interstate motor carrier operations *in the absence of an application for a license and a denial on unconstitutional grounds*. The cases holding licensing laws invalid are all cases in which the carrier followed the appropriate procedure, pursued his administrative remedies, applied for a license, made a record suitable for judicial review, and presented the reviewing court with evidence that the license had been denied or withdrawn on unconstitutional grounds. Where the carrier has sought relief by injunction or otherwise without pursuing his administrative remedies, relief has been denied." (Italics are petitioner's.)

That statement is erroneous in every detail. Interstate motor carriers were granted injunctions by federal courts against enforcement of license laws, *without first applying for licenses*, on the ground that the license laws were unconstitutional, in *Barrett (Adams Express Co.) v. New York*, 232 U.S. 14 (1914); and in *Michigan Public Utilities Commission v. Duke*, 266 U.S. 570 (1925), the latter being cited in the Opinion of the Court of Appeals (app. to petition, p. 24a). Interstate water carriers were granted injunctions under precisely similar facts and under precisely similar principles of law in *Sault Ste. Marie v. International Transit Co.*, 234 U.S. 333 (1914), and in *Toomer v. Witsell*, 334 U.S. 385 (1948). Intrastate motor carriers

successfully attacked state motor vehicle license laws under the 14th Amendment, without first applying for licenses, in non-injunction proceedings, in *Frost v. Railroad Commission of California*, 271 U.S. 583 (1926), and in *Smith v. Cahoon*, 283 U.S. 553 (1931). An interstate water carrier induced the federal courts to hold a license law invalid under the Commerce Clause without applying for a license in *St. Clair County v. Interstate Sand & Car Transfer Company*, 192 U.S. 454 (1904).

In *Smith v. Cahoon*, *supra*, 283 U.S. 553, 562, the Court said that where, as here, a statute unlawfully demands that an applicant prove public convenience and necessity it is not necessary to apply for a license before contesting the law's validity. In *Lovell v. Griffin*, 303 U.S. 444, 452-453 (1938), which involved the First Amendment, the Court said, citing *Smith v. Cahoon*, *supra*:

"As the ordinance is void on its face, it was not necessary for appellant to seek a permit under it."

In *Jones v. Opelika*, 316 U.S. 584, 599 (1942), which also involved the First Amendment, the Court said, also citing *Smith v. Cahoon*, *supra*:

"In *Lovell v. Griffin*, 303 U.S. 444, we held invalid a statute which placed the grant of a license within the discretion of the licensing authority. By this discretion the right to obtain a license was made an empty right. Therefore the formality of going through an application was naturally not deemed a prerequisite to insistence on a constitutional right."

It is beyond question that when an ordinance is void on its face it is not necessary to apply for a license before contesting its validity. Section 28-31.1 is void on its face. It requires that before engaging in interstate commerce under authority of 49 U.S.C. 302(c)(2) respondents must apply for a license and prove public convenience and neces-

sity (app. to petition pp. 16a-17a). Section 28-31.1 has no other purpose whatsoever. Before the amendment of July 26, 1955, respondents could have obtained a license and complied with Chapter 28. Section 28-31.1 closed that door. Since § 28-31.1 supplanted the prior application requirements, it must be construed to change those requirements according to its precise language. Respondents either had to submit to its unlawful restraints upon interstate commerce or ask the Court to enjoin its threatened enforcement.

In *Smith v. Cahoon, supra*, 283 U.S. 553, the state urged that the Court leave undisturbed the statute requiring proof of public convenience and necessity, with the understanding that when application was made for a certificate the state would sift out the invalid from the valid requirements and would invoke only those provisions which in its judgment were "legally applicable." Petitioner seems to be making a precisely similar proposal in the instant case. This Court held that the carrier could not be required to submit to such haphazard administration of his constitutional rights, 283 U.S. pp. 563-566.

4.

ANSWER TO PETITIONER'S PART IV

The legislative history of § 28-31.1 was made relevant, if not independently so, by the insistence of the City and petitioner that § 28-31.1 should be given a construction different from its plain terms. In such a case the official minutes of the Chicago City Council Committee are admissible to prove legislative intent.

Petitioner's argument and authorities under its part IV, pp. 25-28, are not apposite. The cases cited did not involve the use of competent and relevant materials of legislative history to prove legislative intent. The rule applicable

here was stated in *United States v. International Union U.A.W.*, 352 U.S. 567, 570 (1957):

"Appreciation of the circumstances that begot this statute is necessary for its understanding * * *"

In *City of Rockford v. Schultz*, 296 Ill. 254, 257, 129 N.E. 865, 866 (1921), the Court said, in words closely applicable to the instant case:

"The object in construing a statute is to ascertain and give effect to the legislative intent, and to that end the whole act, the law existing prior to its passage, any changes in the law made by the act, *and the apparent motive for making such changes*, will be weighed and considered." (Emphasis added.)

There the Supreme Court of Illinois resorted to the report of a special committee of the legislature to ascertain "the apparent motive" in amending a statute.

In *Dean Milk Co. v. Chicago*, 385 Ill. 565, 570, 53 N.E. 2d 612, 615 (1944), the Court said:

"The rules for the construction of an ordinance are the same as those applied in the construction of a statute."

The Court considered a large amount of extrinsic legislative history and testimony of expert witnesses to determine the meaning of the ordinance, citing the foregoing as justification for such procedure.

In *People v. Olympic Hotel Bldg. Corp.*, 405 Ill. 440, 445, 91 N.E. 2d 597, 600 (1950), the Court said:

"Resort to explanatory legislative history has been declared not to be forbidden no matter how clear the words may first appear on superficial examination. (*Harrison v. Northern Trust Co.*, 317 U.S. 476.)"

In the case cited in the foregoing excerpt this Court made

the statement attributed to it in consulting the report of a committee.

In *Boshuizen v. Thompson & Tayler Co.*, 360 Ill. 160, 163, 195 N.E. 625, 626 (1935), the Court said:

"For the purpose of passing upon the construction, validity or constitutionality of a statute the court may resort to public official documents, public records, both State and national, and may take judicial notice of and consider the history of the legislation and the surrounding facts and circumstances in connection therewith."

The Court of Appeals did not attribute "to the City Council improper motives" (petition, p. 26). The Court quoted verbatim official legislative records of the City, the Council Committee minutes. These minutes state clearly the Committee's legislative intent, and neither petitioner nor anyone else has attempted to claim that the minutes do not say what the Court said they say. These minutes are "the only lawful evidence of the action to which they refer," *Western Sand & Gravel Corp'n. v. Town of Cornwall*, 2 Ill. 2d 560, 564, 119 N.E. 2d 261, 264 (1954).

Petitioner here (petition pp. 9-10) and in the Court of Appeals (appellees' brief pp. 52-58) contends that the words "public convenience and necessity" have a meaning different from that accorded them by the Supreme Court of Illinois. While the legislative history seems independently relevant, petitioner's contention makes it so under the narrowest possible construction of the principle of resort to legislative history.

The legislative history confirms what is shown by the textual evolution and plain language of § 28-31.1. On June 13, 1955, the railroads notified petitioner that their contract with petitioner would end on September 30, 1955 (Tr. 82). Petitioner transmitted this information to the Chairman

of the Committee on Local Transportation of the Chicago City Council (Tr. 93). On June 16, 1955, the Chairman drafted and introduced in the Council a proposed ordinance which would give petitioner a ten-year exclusive franchise to transfer railroad passengers to and from railroad stations (Tr. 85-89, 93-95, 44). The following is from the official minutes of the meeting of July 21, 1955, of the Council Committee, duly certified by the City Clerk (Tr. 93-94):

"The committee then took up for consideration item No. 2 on the agenda—a proposed ordinance granting authority for and licensing the operation of terminal vehicles within the City of Chicago.

"Chairman Sheridan stated that recently he was advised by the Vehicle License Commissioner that he had received a communication from the Parmelee Transportation Company advising that its contract with the railroads was to be cancelled out in September of this year, which would make it appear that the railroads were taking the position of dictating who would or could operate terminal vehicles in Chicago; that he did not think that was right and had prepared an ordinance with the assistance of Mr. Gross, and had it introduced in the City Council and referred to the committee; that subsequently, he had discussed said ordinance with Mr. Grossman of the Corporation Counsel's office, and that as a result of his conference with Mr. Grossman, it would appear that while he—Chairman Sheridan—was on the right track in the matter, his method of approach was wrong.

"Mr. Grossman, who was present at the request of the committee, stated that he had looked over the ordinance as introduced by Chairman Sheridan and is of the opinion that the ordinance is not in proper form; but that he believes the objective can be obtained in some other way. He said he would endeavor to prepare and submit an ordinance on this subject to the committee before the next meeting.

"At the suggestion of Chairman Sheridan, the committee voted to hold a recessed session Tuesday morning, July 26, 1955, at 9:30 o'clock for the purpose of considering such ordinance as Mr. Grossman may submit."

A reporter's transcript of this meeting, not identified as a record of the City, contains the following (Tr. 91):

"Mr. Grossman: The ordinance that was presented to me for consideration yesterday, or the day before yesterday, I examined very carefully, and I don't think that it is within the corporate power of the City of Chicago, but the objective can be obtained in some other way, I think, without conflicting with our charter powers, and I had a conference with some of the members this afternoon, and proposed an approach which I think we can work out between now and the next meeting of the City Council."

The following is the official minutes of the meeting of July 26, 1955, of the Council Committee (Tr. 95):

"Chairman Sheridan stated that this recessed session was being held to receive a report from Mr. Grossman on the proposed ordinance (referred June 16, 1955) granting authority for and licensing the operation of terminal vehicles within the City of Chicago. He said that Mr. Grossman had prepared a substitute ordinance which would accomplish what the committee had in mind, namely, placing the licensing and operation of terminal vehicles under the complete control of the City of Chicago, whereas as the Code now provides, the only one who can secure a license for the operation of a terminal vehicle is someone who has a contract with the railroads."

"Alderman Burmeister moved that the committee recommend to the City Council that it pass the proposed substitute ordinance drafted by Mr. Grossman."

"Alderman McGrath seconded the motion."

"The motion prevailed."

The substitute ordinance so drafted and recommended for passage was passed by the Council on July 26, 1955, and is what is referred to as the "1955 amendment" or "1955 ordinance" containing *inter alia* § 28-31.1 (Tr. 44-45). Section 28-31.1 was copied from a taxicab section of Chapter 28. See part 2 hereof, p. 8.

Answering the argument that § 28-31.1 embodied only valid police power regulation (app. to petition, 28a-29a), the Court of Appeals said in part (30a):

"At meetings of the committee which recommended the 1955 ordinance for passage, the committee chairman made it clear that the objective sought was the assumption by the city of the authority to designate the instrumentality which was to operate terminal vehicles between railroad stations in Chicago. The proceedings of the committee fail to indicate that the chairman or any member of the committee was interested in traffic regulations or any other aspect of the city's police power."

5.

The Court of Appeals held that 49 U.S.C. § 302(c)(2) confers upon respondents the right to conduct the interstation transfer service free from any power of denial or suspension by the City. Petitioner has not appealed from that ruling. That unchallenged construction requires affirmance of the judgment of the Court of Appeals.

Petitioner in its petition for certiorari does not mention or refer in any way to 49 U.S.C. § 302(c)(2), despite the Court's holding that this statute confers upon respondents the right to conduct the interstation transfer service free from any power of denial or suspension by the City. Section 302(c) is set out in essential part in the Court's opinion (app. to petition pp. 25a-26a) and in full in the appendix hereto p. 23. Petitioner does not mention, discuss, or question the Court's construction of § 302(c)(2) and its effect upon the issues (pp. 25a-28a, 30a-31a).

Petitioner thus has not presented for review the Court's construction of 49 U.S.C. § 302(c)(2). Supreme Court Rule 23, paragraph 1, subparagraphs (c), (d) and (h). That unchallenged construction requires affirmance of the judgment.

By force of § 302(c)(2), the interstate interstation transfer service (more than 99 per cent. of the total) performed under the contract between the railroads and Transfer is "considered to be performed" by the railroads "as part of, and shall be regulated in the same manner as, the transportation by railroad * * * to which such services are incidental." The service is performed pursuant to tariffs filed with the Interstate Commerce Commission by the railroads (Tr. 74-81; Rheintgen Affidavit).

Section 302(c)(2) grants to the railroads rights to perform transfer between terminals by motor vehicle which are at least equal in status to the rights conferred by a certificate issued under 49 U.S.C. § 307. Compare the decisions of the Interstate Commerce Commission in *Pick-Up of Livestock in Illinois, Iowa and Wisconsin*; before the enactment of § 302(c)(2), in 238 I.C.C. 671, 678 (1940); and after its enactment, in 248 I.C.C. 385, 397 (1942). The Commission can, by force of § 302(c), compel railroads to perform interstation transfer service, *Cartage Rail to Steamship Lines at New York*, 269 I.C.C. 199, 200 (1947). While the Commission cannot deny or suspend operations being performed within the lawful limits of § 302(c), the Commission alone has the power to deny or suspend operations not lawful under that section. *New York S.&W.R.Co. Application*, 46 M.C.C. 713 (1946); *Movement of Highway Trailers by Rail*, 293 I.C.C. 93, 97-103 (1954); *Trailers on Flatcars, Eastern Territory*, 296 I.C.C. 219 (1955).

The Court therefore held that the rights conferred by 49 U.S.C. § 302(c) are equal in status to those conferred by a certificate under 49 U.S.C. § 307, and that the rule of

Castle v. Hayes Freight Lines, 348 U.S. 61 (1954), applies to the interstation transfer service here involved (app. to petition pp. 30a-31a).

That construction of § 302(c) is obviously correct. Neither petitioner here, nor the City of Chicago in No. 905, has questioned it.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX

SECTION 202. (c) OF THE INTERSTATE COMMERCE ACT, 49 U.S.C. § 302 (c).

(c) Notwithstanding any provision of this section or of section 203, the provisions of this part, except the provisions of section 204 relative to qualifications and maximum hours of service of employees and safety of operation and equipment, shall not apply—

(1) to transportation by motor vehicle by a carrier by railroad subject to part I, or by a water carrier subject to part III, or by a freight forwarder subject to part IV, incidental to transportation or service subject to such parts, in the performance within terminal areas of transfer, collection, or delivery services; but such transportation shall be considered to be and shall be regulated as transportation subject to part I when performed by such carrier by railroad, as transportation subject to part III when performed by such water carrier, and as transportation or service subject to part IV when performed by such freight forwarder;

(2) to transportation by motor vehicle by any person (whether as agent or under a contractual arrangement) for a common carrier by railroad subject to part I, an express company subject to part I, a motor carrier subject to this part, a water carrier subject to part III, or a freight forwarder subject to part IV, in the performance within terminal areas of transfer, collection, or delivery service; but such transportation shall be considered to be performed by such carrier, express company, or freight forwarder as part of, and shall be regulated in the same manner as, the transportation by railroad, express, motor vehicle, or water, or the freight forwarder transportation or service, to which such services are incidental.

ILLINOIS REVISED STATUTES, 1955, CH. 111³, § 56, LAWS OF 1913, P. 460, LAWS OF 1921, P. 731.

§ 55. *Certificate of convenience and necessity—Alteration.*

No public utility shall begin the construction of any new plant equipment, property or facility, which is not in substitution of any existing plant, equipment, property or facility or in extension thereof or in addition thereto, unless and until it shall have obtained from the Commission a certificate that public convenience and necessity require such construction.

No public utility not owning any city or village franchise nor engaged in performing any public service or in furnishing any product or commodity within this State and not possessing a certificate of public convenience and necessity from the State Public Utilities Commission or the Public Utilities Commission, at the time this Act goes into effect shall transact any business in this State until it shall have obtained a certificate from the Commission that public convenience and necessity require the transaction of such business.

Whenever after a hearing the Commission determines that any new construction or the transaction of any business by a public utility will promote the public convenience and is necessary thereto, it shall have the power to issue certificates of public convenience and necessity.

Office, Supreme Court U.S.

F. L. B. D.

OCT 21 1957

JOHN T. FEY, Clerk

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1957

No. 104

PARMELEE TRANSPORTATION CO.,

Appellant-Petitioner.

vs.

THE ATCHISON, TOPEKA AND SANTA FE
RAILWAY COMPANY, ET AL.,

Appellees-Respondents.

On Appeal from and Writ of Certiorari to the United States
Court of Appeals for the Seventh Circuit

BRIEF OF APPELLEES-RESPONDENTS

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ARGUMENT

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2.

ANSWER TO PARMELEE'S PART II

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3.

ANSWER TO PARMELEE'S PART III

Parmelee misapprehends the basic issues. Parmelee treats the transfer operation as a motor vehicle service not subject to the Interstate Commerce Act, whereas in truth the service is a railroad operation subject to Part I of the Act and other federal statutes. Parmelee says that the Court of Appeals held invalid all of the sections relating to terminal vehicles in Chapter 28 of the Chicago Municipal Code, whereas in truth the Court held invalid only § 28-31.1. This section conflicts directly with the Commerce Clause and with federal statutes regulating the transfer service and thus was rightly held invalid by the Court of Appeals	15
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ANSWER TO PARMELEE'S PARTS IV AND V

Section 28-31.1 of Chapter 28 is invalid on its face as applied to the interstate commerce here involved. It is all one piece and the railroads could not be required to comply with it under any possible assumptions.

5.

ANSWER TO PARMELEE'S PART VI

If 28-31.1 is taken at face value it is invalid on its face. Parmelee's attempts to construe it to mean something else than what it says on its face, in an attempt to save it, affords occasion for proper resort to legislative history.

6.

ANSWER TO PARMELEE'S PART VII

Parmelee's Part VII argument apparently assumes that the Court of Appeals held all of Chapter 28 invalid, and the argument is thus without foundation. But if Parmelee means by "sanctions" the power to determine who shall engage in interstate commerce, then the argument is doubly erroneous.

Conclusion

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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1957

No. 104

PARMELEE TRANSPORTATION CO.,
Appellant-Petitioner,
vs.

THE ATCHISON, TOPEKA AND SANTA FE
RAILWAY COMPANY, ET AL.,
Appellees-Respondents.

On Appeal from and Writ of Certiorari to the United States
Court of Appeals for the Seventh Circuit

BRIEF OF APPELLEES-RESPONDENTS

QUESTIONS PRESENTED

*Appellees-Respondents agree with appellant-petitioner
that the first two questions presented are:*

1. Whether the judgment of the Court of Appeals is
appealable under 28 U.S.C. § 1254 (2).

2. Whether appellant-petitioner has standing to main-
tain this appeal and petition for certiorari.

2

Appellees-Respondents will submit that the remaining questions presented are:

3. May the City of Chicago forbid appellee-respondent railroads to engage in interstate commerce authorized by federal statutes unless the railroads prove to the City's satisfaction that public convenience and necessity requires such interstate commerce.

4. Assuming that the answer to question No. 3 is "no," must appellee-respondent railroads "exhaust their administrative remedies" by applying to the City to pass an ordinance finding that public convenience and necessity requires the railroads to engage in interstate commerce authorized by federal statutes.

5. When appellant-petitioner argues that an ordinance has a meaning different from its plain terms, whether resort to legislative history can be had for the purpose of showing that the ordinance means what it says.

STATEMENT OF THE CASE

The statements of the case in Nos. 103 and 104 are identical except as to the first paragraph of each entitled "The Parties."

THE PARTIES

Appellees-respondents are the 21 railroads having passenger terminals in Chicago and Railroad Transfer Service, Inc., with whom the railroads have a contract for the interstation transfer of passengers in Chicago (R. 25-43). For brevity and clarity they will hereafter sometimes be called the railroads and Transfer. Appellees-respondents sued the City of Chicago and its officials in United States District Court for declaratory judgment that a recently amended ordinance regulating transfer of passengers between stations is invalid under the Commerce Clause, and for injunction against its enforcement (R. 4-54). Appellant-petitioner Parmelee Transportation Company was granted leave to intervene as a defendant under Rule 24(b) over the objections of appellees-respondents (R. 58-61, 65-68). The City moved for summary judgment which was granted and the Court dismissed the complaint (R. 71-72, 99-112, 155-160). The Court of Appeals held the ordinance applicable and valid except as to one section which the Court held invalid under the Commerce Clause (R. 196-213).

INTERSTATION TRANSFER OF RAILWAY PASSENGERS IN CHICAGO

For many years the railroads have provided by tariffs for transfer of through passengers and their baggage between downtown Chicago stations. There are eight passenger terminals in downtown Chicago, each being used by from one to six railroads (R. 7). No one railroad passes through Chicago, but a very large number of railroad passengers travel through Chicago every day whose continuous

journeys begin and end at points outside of Chicago, and these transfer at Chicago from the incoming to the outgoing railroad (R. 7-8, 48-49). Approximately 3900 per day of these passengers transfer between incoming and outgoing railroads that are located in different terminal stations (R. 49). The only practical method of transferring these passengers is by motor vehicle equipped to carry such passengers and their accompanying hand baggage simultaneously (R. 7-9, 49). More than 99 per cent of the passengers so transferred between different terminal stations are traveling on through tickets between origin and destination points located in different states (R. 7, 49), and their transfer is therefore interstate commerce (R. 202).

This through transportation from origin to destination via different railroads through Chicago is provided pursuant to tariffs filed with the Interstate Commerce Commission and with the Illinois Commerce Commission (R. 7-8, 74-79, 190-195). Under applicable tariffs the through passenger transportation service includes any required passenger and baggage transfer service from the terminal station in Chicago of the incoming line to the terminal station in Chicago of the outgoing line (R. 8-9).

Pursuant to such tariffs a passenger traveling through Chicago purchases at his point of origin a railroad ticket composed of a series of coupons covering his complete transportation to his destination (R. 8, 49). If his through journey requires him to transfer from one railroad passenger terminal in Chicago to another, a part of his ticket consists of a coupon good for the transfer of himself and his baggage between such terminals (R. 8-9, 49). The tariffs provide that any such required transfer service shall be without additional charge where the fare exceeds a low minimum (R. 8, 74-79, 190-195). The expense of the transfer service is absorbed by the railroads (R. 8).

Upon arrival in Chicago the through passenger delivers the transfer coupon to the railroads' transfer agent, whereupon the transfer agent carries the passenger and his baggage from the incoming to the outgoing station without further charge (R. 26-29). The transfer agent is compensated by a specified payment to it per coupon by the outgoing terminal railroad (R. 29-31).

REGULATION OF THE INTERSTATION TRANSFER SERVICE BY THE CITY OF CHICAGO

The City of Chicago has regulated the interstation transfer vehicles for many years by Chapter 28 of the Chicago Municipal Code. This chapter regulates all "public passenger vehicles" and includes the transfer vehicles which it defines as "terminal vehicles." Prior to July 26, 1955, terminal vehicles were covered only by §§ 28-1 to 28-18, 28-31, and 28-32 of Chapter 28 (R. 171-189). These sections of Chapter 28 are not in issue, having been found applicable and valid by the Court of Appeals (R. 208-209; 200). They require a license for identification and regulation (R. 173, 174, 177 §§ 28-2, 28-5; 28-10, 28-11), an annual license fee (R. 175 § 28-7), observance of safety regulations (R. 173, 174, 181 §§ 28-4, 28-4.1, 28-17), and carrying insurance (R. 178 § 28-12). These provisions may be enforced by suspension or revocation of the license and by fines for violations (R. 179, 180, 189 §§ 28-14, 28-15, 28-32; R. 208-209).

On June 13, 1955, the railroads announced that effective October 1, 1955, they were discontinuing their arrangements with Parmelee Transportation Co. for performance of the transfer service and had made a contract with Railroad Transfer Service, Inc., for this purpose (R. 82, 25-43). Parmelee so informed the Chairman of the Committee on Local Transportation of the Chicago City Council, and on June 16, 1955, the Chairman introduced a proposed ordi-

nance which would give Parmelee an exclusive ten-year franchise to perform interstation transfer service (R. 85-89, 44, 93-95, 201 footnote 12 and related text). The Committee on Local Transportation considered the matter on July 21, 1955, and laid the proposed ordinance aside (R. 90-95); but on July 26, 1955, the Committee recommended an amendment of Chapter 28 to the Council for passage (R. 95) and it was passed the same day (R. 44-45).

This amendment (R. 44-45) made two material changes in Chapter 28: (1) It changed the definition of terminal vehicle so as to remove a previously existing requirement that a terminal vehicle operator must have a contract with railroads. (2) It gave Parmelee permanent terminal vehicle licenses for all of its vehicles and it provided that before the railroads and Transfer may operate any terminal vehicles they must prove that public convenience and necessity requires such operation.

Thus before the amendment "terminal vehicle" was defined as follows (R. 172, 188-189):

"Terminal vehicle" means a public passenger vehicle which is operated under contracts with railroad and steamship companies, exclusively for the transfer of passengers from terminal stations."

"28-31. No person shall be qualified for a terminal vehicle license unless he has a contract with one or more railroad or steamship companies, for the transportation of their passengers from terminal stations.

"It is unlawful to operate a terminal vehicle for the transportation of passengers for hire except for their transfer from terminal stations to destinations in the area bounded on the north by E. and W. Ohio street; on the west by N. and S. Desplaines street; on the south by E. and W. Roosevelt Road; and on the east by Lake Michigan."

These provisions were changed by the July 26, 1955, amendment to read as follows (R. 44-45):

"Terminal vehicle" means a public passenger vehicle which is operated exclusively for the transportation of passengers from railroad terminal stations and steamship docks to points within the area defined in Section 28-31."

"28-31 Terminal Vehicles) Terminal vehicles shall not be used for transportation of passengers for hire except from railroad terminal stations and steamship docks to destinations in the area bounded on the north by E. and W. Ohio Street; on the west by N. and S. Desplaines Street; on the south by E. and W. Roosevelt Road; and on the east by Lake Michigan."

Thus the requirement of a contract with the railroads was removed from the definition by the amendment. The area of operation defined in both the repealed and the new sections just includes the eight downtown railroad stations.

The grant of permanent licenses to Parmelee and the requirement that the railroads and Transfer prove public convenience and necessity before operating any vehicles were accomplished by adding to Chapter 28 a new section, 28-31.1 (R. 44-45):

"28-31.1 Public Convenience and Necessity) No license for any terminal vehicle shall be issued except in the annual renewal of such license or upon transfer to permit replacement of a vehicle for that licensed unless, after a public hearing held in the same manner as specified for hearings in Section 28-22.f, the commissioner shall report to the council that public convenience and necessity require additional terminal vehicle service and shall recommend the number of such vehicle licenses which may be issued.

"In determining whether public convenience and necessity require additional terminal vehicle service due

consideration shall be given to the following:

1. The public demand for such service;
2. The effect of an increase in the number of such vehicles on the safety of existing vehicular and pedestrian traffic in the area of their operation;
3. The effect of an increase in the number of such vehicles upon the ability of the licensee to continue rendering the required service at reasonable fares and charges to provide revenue sufficient to pay for all costs of such service, including fair and equitable wages and compensation for licensee's employees and a fair return on the investment in property devoted to such service;
4. Any other facts which the commissioner may deem relevant.

If the commissioner shall report that public convenience and necessity require additional terminal vehicle service, the council, by ordinance, may fix the maximum number of terminal vehicle licenses to be issued not to exceed the number recommended by the commissioner."

The foregoing § 28-31.1 was held invalid by the Court of Appeals (R. 208).

COMMENCEMENT OF THE LITIGATION

The railroads and Transfer advised the City that Chapter 28 as amended July 26, 1955, did not apply to their transfer operation arranged by the contract between them (R. 25-43), but that if it did apply it was invalid because of conflict with the Commerce Clause; but nevertheless, the City asserted that the ordinance as amended did apply to such transfer service, and was valid, and that the City would enforce it against the railroads and Transfer (R. 6-7 § 4). Thereafter the railroads and Transfer sued in District Court for declaratory judgment that the ordinance

is inapplicable, but that if applicable, it violates the Commerce Clause, and asked for injunction against its enforcement (R. 4-54). Parmelee was permitted to intervene as a defendant under Rule 24(b) over objection of the railroads and Transfer (R. 58-61, 65-68). The City moved for summary judgment (R. 71-72).

The District Court held Chapter 28 applicable to respondents and valid (R. 99-112, 155-159), and entered final judgment (R. 160):

"* * * that summary judgment be entered in favor of the defendants against the plaintiffs, with costs, and that this action be and it is hereby dismissed."

The railroads and Transfer appealed from this judgment to the Court of Appeals (R. 161-162).

In the Court of Appeals the City and Parmelee strongly asserted and argued in their joint brief (1) that Chapter 28 is applicable to the interstation transfer service, and (2) that Chapter 28 is valid in all respects. (Certified copy of this brief is filed here.)

The Court of Appeals held Chapter 28 applicable to the transfer service (R. 208-209, 200) but held § 28-31.1 (R. 44-45) to be invalid because in conflict with the Interstate Commerce Act and the Commerce Clause (R. 208, 204-211).

SUMMARY OF ARGUMENT

1.

The judgment of the Court of Appeals would be appealable under 28 U.S.C. § 1254 (2) by one having standing to appeal, since the judgment is final. The Court held § 28-31.1 of Chapter 28 of the Chicago Municipal Code invalid but held the rest of Chapter 28 applicable and valid. It thus disposed of every issue in the case and left nothing for the District Court to decide.

2.

Appellant-Petitioner Parmelee lacks standing to seek review on appeal or by writ of certiorari. The ordinance which Parmelee is defending, § 28-31.1, requires proof of public convenience and necessity to the satisfaction of the City of Chicago before engaging in interstate commerce. Parmelee claims that this ordinance gives Parmelee the right to object to performance of interstate commerce by one not licensed under the ordinance. But since the City has no power to impose such a requirement, Parmelee can derive no right as a party in interest from that void.

3.

The interstation transfer service which is being performed under the contract between appellee-respondent railroads and appellee-respondent Transfer (R. 25-43) is railroad transportation subject to Part I of the Interstate Commerce Act by force of 49 U.S.C. § 302(c)(2). The effect of this statute is to merge the identity of Transfer into the railroads so that the transfer operation is simply and wholly railroad operation.

The interstation transfer service is performed pursuant to tariffs filed by the railroads with the Interstate Com-

merce Commission and with the Illinois Commerce Commission. While these tariffs remain in effect they have the force and effect of statutes compelling the railroads to perform the transfer service. The Interstate Commerce Commission regulates service performed under § 302(c)(2) and has power to compel performance of the service. Other Federal statutes including 49 U.S.C. § 3(4) and 45 U.S.C. § 84 authorize and compel the railroads to perform the service.

These Federal statutes supersede the power of the City of Chicago to enforce § 28-31.1 of Chapter 28 against the railroads and Transfer in the performance of the inter-station transfer service. It would be impossible for the railroads to perform their obligations under their tariffs and under these Federal statutes if the City were to exercise the powers asserted in § 28-31.1.

The railroad communication and interchange act of 1866, 45 U.S.C. § 84, was enacted for the express purpose of preventing obstructions to interstate commerce like § 28-31.1 of Chapter 28. One of its purposes, as its legislative history shows, was to make the principle of *Gibbons v. Ogden*, 9 Wheaton 1 (1824), applicable to interstate railroad operation. The instant case affords a perfect example for the application of *Gibbons v. Ogden*.

The telegraph act of 1866 was enacted to prevent state obstructions of interstate telegraph companies, and the decision of this Court in *Pensacola Telegraph Co. v. Western Union Telegraph Co.*, 96 U.S. 1 (1878), construing the telegraph act and holding a conflicting Florida Act invalid, is indistinguishable from the issue in the instant case.

Castle v. Hayes Freight Lines, 348 U.S. 61 (1954), has roots running directly to the railroad and telegraph acts

of 1866 and to the decisions construing them. The *Hayes* case is direct authority that § 28-31.1 is invalid.

The authorities upon which appellant-petitioner Parmelee relies are cases involving motor carriers not subject to the Interstate Commerce Act or any other regulation. Since the interstation transfer service is railroad service and is fully subject to regulation under Part I of the Interstate Commerce Act, Parmelee's authorities are not relevant. Moreover, no decision of this Court has ever sustained an enactment similar to § 28-31.1. Instead, every statute of this character that has come before the Court has been held invalid under the Commerce Clause even in the absence of any superseding federal legislation.

4.

Appellant-Petitioner Parmelee argues that the Court of Appeals erred in presuming that the ordinance would be unconstitutionally applied, and further argues that the railroads and Transfer should be required to "exhaust their administrative remedies" before attacking the validity of the ordinance. There is no merit in these arguments. Section 28-31.1 requires proof of public convenience and necessity before engaging in interstate commerce and thus is invalid on its face. It contains no other standards which could be applied. The very first step required under it is to apply for a certificate of public convenience and necessity to engage in interstate commerce, and such an application cannot constitutionally be required in the first instance. Hence there is no possibility for construing the statute otherwise than as invalid, and appellees-respondents cannot be required to "exhaust their administrative remedies" by making an application for permission to prove public convenience and necessity to engage in interstate commerce.

Parmelee argues that the phrase "public convenience and necessity" may be construed to include power which the City has the right to exercise, but this claim is without merit. Both the Supreme Court of Illinois and this Court have uniformly construed the phrase to include only economic regulation of transportation and not any elements of the police power. Moreover, the City has no right under the police power to determine who shall perform the inter-station transfer service under 49 U.S.C. § 302(c)(2).

5.

Parmelee asserts that the Court of Appeals erred in resorting to the legislative history of § 28-31.1. The Court held that § 28-31.1 was invalid on its face, but in response to an argument by Parmelee that the section should be given a construction different from its plain terms the Court looked to the legislative history and determined that the section meant what it said. The legislative history is not necessary to the Court's conclusion that the section is invalid and it bears only on Parmelee's argument that the words "public convenience and necessity" should be given a construction different from that universally given them by the Supreme Court of Illinois and by this Court.

However, the legislative history is so pervading and so public that it is independently relevant and it need not be ignored in the consideration of this case.

6.

Since only § 28-31.1 of Chapter 28 was held invalid, there remain in Chapter 28 licensing provisions as comprehensive as legitimate exercise of the police power can permit. Therefore there is no basis for Parmelee's argument that the Court of Appeals substituted its judgment for the judgment of the City Council as to whether licensing of the terminal vehicle operation is necessary.

ARGUMENT

1.

ANSWER TO PARMELEE'S PART I.

The judgment of the Court of Appeals is appealable under 28 U.S.C. § 1254 (2).

Candor requires the position that the judgment would be appealable by one having standing to appeal. The Court held § 28-31 of Chapter 28, Chicago Municipal Code (R. 44-45), invalid because in conflict with the Commerce Clause and the Interstate Commerce Act (R. 208). It held the rest of Chapter 28 (R. 171-189) applicable and valid (R. 208-210, 290). It thus disposed of every issue and remanded the cause to the District Court "for further proceedings not inconsistent with the views expressed in the opinion of this Court filed this day." (R. 212-213). That is a final judgment. *Gulf Refining Co. v. United States*, 269 U.S. 125, 135-136 (1925); *Johnson v. Muelberger*, 340 U.S. 581, 583 (1951); *Richfield Oil Corp. v. State Board of Equalization*, 329 U.S. 69, 73 (1946).

2.

ANSWER TO PARMELEE'S PART II

Parmelee lacks standing to seek review on appeal or by writ of certiorari.

To establish standing Parmelee relies, pp. 21-22, entirely on *Frost v. Corporation Commission*, 278 U.S. 515 (1929), and *Alton Railroad Co. v. United States*, 315 U.S. 15 (1942). Far from supporting, these cases prove lack of standing.

In the *Alton* case, 49 U.S.C. § 305(g) gave right of review to "any party in interest," but it did not define those terms. The Court held that status as a "party in interest" accrued

from 49 U.S.C. §§ 306(a), 307(a), which require that one proposing to engage in interstate commerce prove public convenience and necessity. The Court held, pp. 19-20, citing legislative history, that these sections were intended, *inter alia*, for the protection of the economic interests of the railroads in their competition with motor carriers, and that the railroads had the right to protect that economic interest by review of Commission action under these sections.

Parmelee equates § 28-31.1, Chapter 28, Chicago Municipal Code, with 49 U.S.C. §§ 306(a), 307(a). We agree that the equation is perfect, but it clearly proves that Parmelee lacks standing. The City has no power to determine whether proposed interstate commerce is required by public convenience and necessity, has no power to protect the economic interest of Parmelee in competition with other interstate carriers; and no right as a party in interest to object to proposed interstate commerce can accrue to Parmelee from that void.

The *Frost* case, 278 U.S. 515, is in accord with the *Alton* decision, but *Frost* involved only intrastate commerce.

3.

ANSWER TO PARMELEE'S PART III

Parmelee misapprehends the basic issues. Parmelee treats the transfer operation as a motor vehicle service not subject to the Interstate Commerce Act, whereas in truth the service is a railroad operation subject to Part I of the Act and other federal statutes. Parmelee says that the Court of Appeals held invalid all of the sections relating to terminal vehicles in Chapter 28 of the Chicago Municipal Code, whereas in truth the Court held invalid only § 28-31.1. This section conflicts directly with the Commerce Clause and with federal statutes regulating the transfer service and thus was rightly held invalid by the Court of Appeals.

PARMELEE'S BASIC ERRORS

Parmelee argues, Part III, p. 27, that "the City may require a license as a means of effectuating its legitimate interest in regulating public passenger vehicles for hire, where the carrier does not hold a federal certificate of convenience and necessity, although the carrier is engaged primarily in interstate commerce."

This argument, carried through pp. 27-40, misapprehends totally the issue here involved. Parmelee treats the transfer operation as a motor vehicle service not subject to the Interstate Commerce Act. Parmelee is twice in error. The truth is (1) that the transfer service is a railroad operation (2) subject to Part I of the Act and other federal statutes. The Court of Appeals so held (R. 203-206). All of Parmelee's Part III argument wholly misses the mark.

All of the cases cited by Parmelee, pp. 27-40, as in support of its argument involve motor vehicles not subject to regulatory statutes, and thus are not in point here. We will hereafter discuss those cases briefly, but we call attention now that the case on which Parmelee chiefly relies, pp. 30-31, *Columbia Terminals Co. v. Lambert*, D.C. Mo., 30 F. Supp. 28 (1939), was decided before the enactment of 49 U.S.C. § 302(c), Sept. 18, 1940, 54 Stat. 920, and thus is distinguishable on that ground alone. The *Columbia Terminals* case is also distinguishable completely on grounds intrinsic to its opinion. See the Opinion of the Court of Appeals in the instant case (R. 211 footnote 26).

Another erroneous Parmelee statement, p. 27, should be noted. Parmelee says: "The Court of Appeals has stricken down the City's plan for regulating terminal vehicles in the interest of public safety and welfare, leaving this important branch of the public transportation of pas-

sengers for hire within the City unregulated by any governmental agency."

That is erroneous in at least four important particulars. (1) The Court of Appeals held only § 28-31.1 of the ordinance invalid (R. 208). This was part of the amendment of 1955 (R. 44-45). The Court held all of the rest of the ordinance (R. 171-189, 44-45) applicable and valid (R. 208-210, 200). Thus all of the ordinance existing prior to 1955, described by Parmelee, pp. 5-7, and which Parmelee considered adequate regulation, p. 5, still remains applicable and valid under the decision of the Court of Appeals. (2) The transfer vehicles are subject to all of the general motor vehicle traffic safety laws of Illinois and of Chicago and the City police may enforce the state laws. (3) The transfer service is fully regulated under Part I of the Interstate Commerce Act. (4) The 1955 amendment shows on its face that it was not intended as a "plan for regulating terminal vehicles in the interest of public safety and welfare."

THE NATURE OF THE 1955 AMENDMENT

The text of the 1955 amendment to Chapter 28 (R. 44-45) and the circumstances of its origin have been set out above, pp. 5-8. It will be noted that new § 28-31.1 accomplishes two things. (1) It provides for the annual renewal or transfer to replacement vehicles of all of the existing Parmelee terminal vehicle licenses without proof of public convenience and necessity. (2) It compels any other applicant for a terminal vehicle license to prove to the satisfaction of the city vehicle license commissioner that "public convenience and necessity" requires issuance of the license, and it provides that upon a favorable report by the commissioner "the council, by ordinance, may fix the maximum number of terminal vehicle licenses to be issued not to

exceed the number recommended by the Commissioner."

In sum and substance new § 28-31.1 gave to the City Council the right to determine by ordinance whether any one other than Parmelee may engage in interstate commerce by terminal vehicle. The sole criterion for Council action is the economic concept of "public convenience and necessity."

There are no possible facets of validity in § 28-31.1. (1) This is not a case where regulatory legislation is aimed at a type of traffic deemed undesirable. Parmelee is permitted to continue with all its vehicles. (2) Section 28-31.1 did not add any safety measures whatsoever to those already existing and applicable in Chapter 28 (R. 171-189). It cannot be justified as a "police power" measure. (3) The provision of numbered subparagraph 2 of § 28-31.1 was not actually intended to reduce traffic congestion. This is so because all of Parmelee's vehicles are left in operation and the ordinance as amended can only add more vehicles.

No decision of the Court ever has sustained a measure of this character. Instead, there are numerous cases holding such an enactment violative of the Commerce Clause. We will proceed to consider the nature of the transfer service, and we will show that under federal statutes and decisions § 28-31.1 is invalid in its application to the service.

THE TRANSFER SERVICE IS RAILROAD TRANSPORTATION SUBJECT TO PART I OF THE INTERSTATE COMMERCE ACT

The interstation transfer service is railroad transportation subject to Part I of the Interstate Commerce Act and is being performed *by the railroads* by force of § 202(c)(2) of Part II of the Act, 49 U.S.C. § 302(c)(2), and other federal statutes. Section 302(c) is the following:

§ 302(c) Notwithstanding any provision of this sec-

tion or of section 303, the provisions of this part [Part II], except the provisions of section 304 relative to qualifications and maximum hours of service of employees and safety of operation and equipment, shall not apply—

(1) to transportation by motor vehicle by a carrier by railroad subject to part I, or by a water carrier subject to part III, or by a freight forwarder subject to part IV, incidental to transportation or service subject to such parts, in the performance within terminal areas of transfer, collection, or delivery services; but such transportation shall be considered to be and shall be regulated as transportation subject to part I when performed by such carrier by railroad, as transportation subject to part III when performed by such water carrier, and as transportation or service subject to part IV when performed by such freight forwarder;

(2) to transportation by motor vehicle by any person (whether as agent or under a contractual arrangement) for a common carrier by railroad subject to part I, an express company subject to part I, a motor carrier subject to this part, a water carrier subject to part III, or a freight forwarder subject to part IV, in the performance within terminal areas of transfer, collection, or delivery service; but such transportation shall be considered to be performed by such carrier, express company, or freight forwarder as part of, and shall be regulated in the same manner as, the transportation by railroad, express, motor vehicle, or water, or the freight forwarder transportation or service, to which such services are incidental. (Act of Sept. 18, 1940, 54 Stat. 920; Act of May 16, 1942, 56 Stat. 300.)

If the railroads were performing the transfer service by their own directly owned and operated motor vehicles it would be hard to imagine that anyone would argue that the service was not railroad service under ¶ (1) of § 302(c). Yet the status of the service performed under the contract between the railroads and Transfer (R. 25-43) is, by force

of ¶ (2) of § 302(c), precisely the same as if the railroads were performing it directly under ¶ (1). Thus it will be noted that § 302(c)(2) provides that

“ * * * transportation by motor vehicle by any person (whether as agent or under a contractual arrangement) for a common carrier by railroad subject to Part I * * * in the performance within terminal areas of transfer, collection, or delivery service * * * shall be considered to be performed by such carrier * * * as part of, and shall be regulated in the same manner as, the transportation by railroad * * * to which such services are incidental.” (Emphasis added.)

While this language is entirely clear, it may be noted that Congress meant exactly what it said. See Conference Report, House Report No. 2832, 76th Cong., 3rd Sess., p. 74 § 17(B) (Serial vol. 10444):

“These definitions, as rewritten, also dealt with the case where a person (acting as agent or under a contractual arrangement) performed transfer, collection, or delivery services by motor vehicle within terminal areas for carriers by railroad, express companies, other motor carriers, or water carriers, and provided that in such a case the transportation should be regulated as transportation performed by the person for whom the services were rendered in the same manner as the railroad, express, motor carrier, or water transportation to which the services were incidental.”

The effect of § 302(c)(2) is to merge the identity of Transfer into the railroads. Transfer is simply the *alter ego* of the railroads, and the transfer operation is simply and wholly railroad transportation. *Thomson v. United States*, 321 U.S. 19, 24 (1944); *United States v. Rosenblum Truck Lines*, 315 U.S. 50, 56 (1942). These cases hold that for purpose of regulation generally under the Interstate Commerce Act the agent, though performing all of the

physical service, is integrated into the principal to the extent of losing his own identity. Here the statute so provides in express terms and makes the operation subject to Part I.

Decisions of the Interstate Commerce Commission illustrate the application of § 302(c). Before the section was effective, in *Pick-Up of Livestock in Illinois, Iowa and Wisconsin*, 238 I.C.C. 671 (1940), the Commission cancelled railroad tariffs providing for pick-up of livestock by motor truck within a 10-mile radius of railroad stations on the grounds that the railroads had no motor carrier authority under Part II of the act and that the transportation was not subject to Part I, saying, 238 I.C.C. p. 678:

"It is our conclusion, therefore, that the motor-vehicle operations under consideration are not subject to the provisions of part I, and hence are subject to the provisions of part II. It necessarily follows that they are being conducted without lawful authority, since no certificate that public convenience and necessity require such operations has been sought or obtained."

After § 302(c) was enacted, Sept. 18, 1940, 54 Stat. 920, the Commission reopened the case and held that by force of the statute the proposed pick-up operations by the railroads were now lawful, *Pick-Up of Livestock in Illinois, Iowa and Wisconsin*, 248 I.C.C. 385 (1942), saying, p. 397:

"We find that respondents' schedules and that respondents' pick-up operations and practices thereunder to the extent hereinafter indicated are 'within terminal areas' within the meaning of section 202(c) of part II, and that such truck operations must be regulated as transportation subject to part I of the act. We further find that a lawful terminal area for each station should not exceed a radius of 10 miles, and that the tariffs should clearly and definitely define the areas within which pick-up service is performed."

In *Cartage, Rail to Steamship Lines at New York*, 269 I.C.C. 199, 200 (1947), the Commission held that § 302(c) empowered it to compel railroads to perform interstation transfer service by motor vehicle. In *Movement of Highway Trailers by Rail*, 293 I.C.C. 93, 97-103 (1954), the question was whether railroad owned highway trailers moved on railroad flat-cars in so-called "piggyback" service; and having prior and subsequent movements on their own wheels on city streets, were subject to Part I or Part II; that is, whether the railroads needed authority under Part II in order to perform the operation or any part of it. The Commission held the entire operation subject to Part I, the movement on city streets being subject to Part I by force of § 302(c). Railroad tariffs defining the entire street-rail-street "piggyback" operation as subject only to Part I were held valid in *Trailers on Flatcars, Eastern Territory*, 296 I.C.C. 219 (1955), by reason of § 302(c). This section applies to passenger transfer. *New York, S. & W. R. Co. Application*, 46 M.C.C. 713, 722-725 (1946).

Section 3(4) of Title 49 provides:

"(4) All carriers subject to the provisions of this part shall, according to their respective powers, afford a reasonable, proper, and equal facilities for the interchange of traffic between their respective lines and connecting lines, and for the receiving, forwarding, and delivering of passengers or property to and from connecting lines; and shall not discriminate in their rates, fares, and charges between connecting lines, or unduly prejudice any connecting line in the distribution of traffic that is not specifically routed by the shipper. As used in this paragraph the term 'connecting line' means the connecting line of any carrier subject to the provisions of this part or any common carrier by water subject to part III." (Emphasis added.)

"There is no warrant for limiting the meaning of 'con-

neeting lines' to those having a direct physical connection * * * The term is commonly used as referring to all the lines making up a through route." *Atlantic Coast Line R. Co. v. United States*, 284 U.S. 288, 293 (1932). The lines operating the Chicago transfer service all make up through routes through Chicago (R. 7-8, 48-50, 74-79, 190-195), and thus the transfer service in Chicago is performed by connecting lines within the meaning of § 3(4).

By force of 49 U.S.C. § 3(4), *supra*, the railroads "are required to * * * afford motor truck transfer in connection with transportation by rail." *Central Transfer Company v. Terminal Railroad Assn.*, 288 U.S. 469, 473 footnote 1 (1933).

The transfer service is performed pursuant to railroad tariffs filed with the Interstate Commerce Commission (R. 7-8, 74-79, 190-195). While tariffs remain on file they are presumed valid. *Robinson v. Baltimore & Ohio Railroad Co.*, 222 U.S. 506, 508-510 (1912). The tariffs have the force and effect of a statute in compelling performance of the service. *Pennsylvania Railroad Co. v. International Coal Mining Co.*, 230 U.S. 184, 197 (1913).

It clearly appears that the interstation transfer service is railroad transportation subject to Part I of the Interstate Commerce Act, and that for all purpose of regulation the identity of Transfer is merged with the railroads. Hence, Parmelee's assumption that the service is a motor vehicle service not subject to federal regulation is erroneous.

PARMELEE'S ARGUMENT

Parmelee's argument, pp. 37-40, to the effect that the transfer service is not railroad service ignores some statutes and authorities and misconstrues the others. Parmelee

points out, p. 39, that in *Status of Parmelee Transportation Co.*, 288 I.C.C. 95, 104 (1953), the Commission held that Parmelee was not a "carrier as defined in Part I of the act." That holding was based on 49 U.S.C. § 302(c)(2) by force of which Parmelee's identity for purpose of regulation was merged into the railroads. That holding accords with the principle to the same effect stated in *Thomson v. United States*, 321 U.S. 19, 24-25 (1944); and *United States v. Rosenblum Truck Lines*, 315 U.S. 50, 56 (1942). But that only emphasizes that the transfer operation is a railroad operation.

Parmelee says, p. 38, that the Interstate Commerce Act "does not require the railroads to provide terminal transfer service." That argument ignores the principle that having filed tariffs requiring performance of the service (R. 7-S, 74-79, 190-195), the railroads are compelled to continue the service while the tariffs remain on file, *Pennsylvania Railroad Co. v. International Coal Mining Co.*, 230 U.S. 184, 192 (1913), and that the Commission has power to forbid cancellation of the tariffs, *Cartage, Rail to Steamship Lines at New York*, 269 I.C.C. 499, 200 (1947). That argument ignores the broad and well established principle that the measure of the railroads' powers, rights, and responsibilities under the act is not limited to what they are "required" to do, but instead, by what they elect to do, which may be beyond any actual requirement. *Barringer & Co. v. United States*, 319 U.S. 1, 8 (1943). Moreover, a permissible service voluntarily undertaken becomes equal in status in all respects to a service initially required by law insofar as the operation, protection, and impact of the Interstate Commerce Act is concerned. *Cincinnati, N. O. & T. P. Railway Co. v. Interstate Commerce Commission*, 162 U.S. 184, 191-192 (1896); *St. Louis Southwestern Ry. Co. v. United States*, 245 U.S. 136, 144 (1917). And finally, Parmelee's

argument ignores the comprehension of this subject expressed by the Court in *Central Transfer Co. v. Terminal Railroad Association*, 288 U.S. 469, 473 footnote 1 (1933), in saying that by force of 49 U.S.C. § 3(4)

"* * * rail carriers subject to it are required to afford * * * motor truck transfer in connection with transportation by rail."

Compare *Donovan v. Pennsylvania Company*, 199 U.S. 279, 295-297 (1905).

FEDERAL STATUTES HAVE SUPERSEDED THE POWER OF THE CITY TO ENFORCE § 28-31.1

Being railroad transportation subject to Part I the transfer service is subject to regulation thereunder and to other Federal Statutes respecting railroad transportation. By force of these statutes the power of the City to impose the regulation here in issue has been superseded and is void under the Commerce Clause.

THE INTERSTATE COMMERCE ACT

The Interstate Commerce Act was amended in 1906 to include express companies within its coverage for the first time, 24 Stat. 584, 49 U.S.C. § 1(3)(a). This inclusion was held to supersede the power of the City of New York to enforce an ordinance requiring licenses for express company trucks that delivered packages following an interstate railroad haul. *Barrett (Adams Express Co.) v. New York*, 232 U.S. 14 (1914). The Court said, p. 32:

"* * * Congress has exercised its authority and has provided its own scheme of regulation in order to secure the discharge of the public obligations that the business involves. Act of June 29, 1906, c. 3591, 34 Stat. 584."

Answering the argument that the ordinance was valid under the police power the Court said, p. 31:

"Local police regulations cannot go so far as to deny the right to engage in interstate commerce, or to treat it as a local privilege, and prohibit its exercise in the absence of a local license."

To the same effect are *New York Central & Hudson River Railroad Co. v. Hudson County*, 227 U.S. 248, 263 (1913), and *Castle v. Hayes Freight Lines, Inc.*, 348 U.S. 61, 65 (1954). It is clear that 49 U.S.C. § 302(c)(2) supersedes the City's attempted regulation under § 28-31.1 of Chapter 28 (R. 44-45) as fully as the supersession considered in the three cases above cited. We will take up the *Hayes* case more fully later.

THE RAILROAD COMMUNICATION AND INTERCHANGE ACT OF 1866

A statute of significance to this case is 45 U.S.C. § 84. It was enacted in 1866 to put an end to an obstruction to interstate commerce by railroad remarkably similar to that here involved, and to outlaw all future obstructions of whatever nature to interstate commerce by railroad. Legislative history is explicit on these points, and the Court has given the statute the meaning and force called for by its history.

The exact form of enactment of the statute is of interest because of its history, 14 Stat. 66:

"CHAP. CXXIV.—*An Act to facilitate commercial, postal, and military communication among the several States.*

"Whereas the Constitution of United States confers upon Congress, in express terms, the power to regulate commerce among the several States, to establish post roads, and to raise and support armies: Therefore:—

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That every railroad company in the United States, whose road is operated by steam, its successors and assigns, be, and is hereby, authorized to carry upon and over its road, boats, bridges, and ferries, all passengers, troops, government supplies, mails, freight, and property on their way from any State to another State, and to receive compensation therefor, and to connect with roads of other States so as to form continuous lines for the transportation of the same to the place of destination: *Provided,* That this act shall not affect any stipulation between the government of the United States and any railroad company for transportation or fares without compensation, nor impair or change the conditions imposed by the terms of any act granting lands to any such company to aid in the construction of its road, nor shall it be construed to authorize any railroad company to build any new road or connection with any other road without authority from the State in which said railroad or connection may be proposed:

Sec. 2. And be it further enacted, That Congress may at any time alter, amend, or repeal this act.

“APPROVED, June 15, 1866.”

Both the specific immediate purpose and the general purpose of this Act were stated in some detail in the House Committee Report recommending its passage, House Report No. 31, 38th Cong., 1st Sess., March 9, 1864 (Serial vol. 1206), printed in full in Appendix hereto p. 48. The bill proposed by the Report was passed by the House in the 38th Congress but was not voted upon by the Senate. This same bill was re-introduced as H.R. 11 in the 39th Congress, 1st Session, and was enacted.

The debates in both the 38th and 39th Congresses all revolve about the facts and issues recited in House Report

No. 31. The linkage of 45 U.S.C. § 84 to House Report 31, 1st Sess., 38th Congress, is complete.

The Report shows, *inter alia*: The New Jersey legislature chartered the Camden and Amboy Railroad Company and provided by an act of 1854:

"That it shall not be lawful, at any time during the said railroad charter, (to wit, the Camden and Amboy,) to construct any other railroads in this State without the consent of the said companies, which shall be intended or used for the transportation of passengers or merchandise between the cities of New York and Philadelphia, or to compete in business with the railroad authorized by the act to which this supplement is relative." (New Jersey Session Laws for 1854, p. 387.)"

Under that act the Camden and Amboy obtained an injunction in New Jersey courts forbidding a rival, the Delaware and Raritan Bay Railroad Company, "to carry or aid in carrying passengers and freight between New York and Philadelphia." The tracks of the Delaware and Raritan were in New Jersey but "by means of these roads and boats on Raritan Bay and the Delaware River, a continuous through line is constituted between the cities of New York and Philadelphia."

The House Committee's conclusions were in part the following:

The text of the bill in the 38th Congress, H.R. 307, is not contained in Report No. 31 which accompanied it, but is shown in the debates on passage in the House, 34 Cong. Globe 2253-2264; and the bill as passed appears at page 2264. In the 39th Congress the reintroduced bill was reported "do pass" as H.R. 11 by the Committee on Commerce, 36 Cong. Globe 82, and its proponents stated that it was the same bill as H.R. 307 which had failed to pass in the 38th Congress, 36 Cong. Globe 82-83. It was debated and passed in the House, 36 Cong. Globe 1548-1550, and in the Senate, 36 Cong. Globe 2870-2876.

"In addition to the well-established power of Congress to establish post roads, the committee believe that its power to regulate commerce confers upon it ample authority to grant the petitioners' prayer, and to relieve them from the embarrassments created by the narrow and obnoxious legislation of New Jersey.

"Article 1, section 8, of the Constitution of the United States provides that Congress 'shall have power to regulate commerce with foreign nations, *and among the several States*, and with the Indian tribes.'

"This power has been held to be exclusive in Congress, and that it cannot be abridged or impaired by State legislation:—(*Gibbons v. Ogden*, 9 Wheaton.)

"It clearly appears, from the various opinions given in these celebrated cases, that the power to regulate commerce is absolutely exclusive in Congress, so that no State can constitutionally enact laws or any regulation of commerce between the States, whether Congress has exercised the same power in question or left it free.

"The inference from the various cases cited is that New Jersey, by the law above quoted, and by virtue of which she is attempting to destroy the franchises of the petitioners, has usurped the jurisdiction of Congress, and that we are authorized to interfere to prevent that usurpation from abridging one of the means of communication between New York and Philadelphia."

The Act of June 13, 1866, 14 Stat. 66, 45 U.S.C. § 84, was the means adopted to accomplish the recommended action.

There is remarkable similarity between the New Jersey Act of 1854 and the Chicago ordinance of 1955, in respect both to ends and means. In each case a state legislative body assumed the power to decide whom it would permit to engage in interstate commerce. The Court's decisions

construing 45 U.S.C. § 84 are especially apposite to the instant case.

In *Boyman v. Chicago & North Western Railway Co.*, 125 U.S. 465 (1888), an Iowa statute was held invalid that forbade transportation of intoxicating liquor into the state except where a permit had been issued by the state.² The Court, p. 484, *recited most of* § 84, referred to an act authorizing construction of railroad bridges, and said:

“These Acts were passed under the power vested in Congress to regulate commerce among the several States, and were designed to remove trammels upon transportation between different States which had previously existed, and to prevent a creation of such trammels in future, and to facilitate railway transportation by authorizing the construction of bridges over the navigable waters of the Mississippi; and they were intended to reach trammels interposed by state enactments or by existing laws of Congress. * * *. The power to regulate commerce among the several States was vested in Congress in order to secure equality and freedom in commercial intercourse against discriminating state legislation.”

Union Pacific Railway Co. v. Chicago, Rock Island & Pacific Railway Co., 163 U.S. 564 (1896), involved an attempt by Union Pacific to cancel a contract with Rock Island providing for connections and through transportation between the two as *ultra vires* the U.P. Charter. The Court denied the relief sought. After reciting most of 45 U.S.C. § 84 the Court said, p. 589:

“It is impossible for us to ignore the great public

This decision prevailed until in 1913 the Webb-Kenyon Act, 37 Stat. 699, removed the protection of the Commerce Clause from intoxicating liquor. See *Clark Distilling Co. v. Western Maryland Railroad Co.*, 242 U.S. 311 (1917). See a brief comparison of the *Boyman* and *Clark Distilling* cases in *Prudential Ins. Co. v. Benjamin*, 328 U.S. 408, 424 fn. 29 (1946).

policy in favor of continuous lines thus declared by Congress, and that such it is in effectuation of that policy that such business arrangements as will make such connections effective are made."

It may be noted that the *proviso* of 45 U.S.C. § 84 is in no way applicable here. What the railroads are here seeking to accomplish is not a new operation; they are simply continuing an interstation transfer service that they have been performing for many years, for the past seventeen years, under 49 U.S.C. § 302(c)(2). It is the City that is trying to bring about a new situation, by the enactment of § 28-31.1.

THE TELEGRAPH ACT OF 1866

The same Congress that enacted the railroad communication act of 1866, now 45 U.S.C. § 84, also passed the telegraph act, July 24, 1866, 14 Stat. 221, now 47 U.S.C. §§ 1-5, Appendix p. 58. The two statutes have had parallel constructions and both have been cited in the same decisions on the issues of the instant case. Probably the most famous case to emerge from judicial construction of either act is *Pensacola Telegraph Company v. Western Union Telegraph Company*, 96 U.S. 1 (1878). A Florida statute, similar in effect to the Chicago ordinance, forbade any telegraph company to operate lines in interstate commerce except by the state's permission. The Court held that the federal act rendered the state act invalid under the Commerce Clause. This holding is indistinguishable from the issue of the instant case.

On the same day, March 19, 1888, that the Court decided *Bowman v. Chicago & North Western Railway Co.*, 125 U.S. 465, *supra*, it also decided *Western Union Telegraph Co. v. Atty. Gen. of Massachusetts*, 125 U.S. 530. There it was held that a Massachusetts statute was invalid by force of

the telegraph act of 1866, in that it authorized an injunction forbidding operation of the telegraph lines until the company paid its taxes. The Court said, p. 554:

"If the Congress of the United States had authority to say that the Company might construct and operate its telegraph over these lines, as we have repeatedly held it had, the State can have no authority to say it shall not be done."

In *Kansas City Southern Railway Co. v. Kaw Valley Drainage District*, 233 U.S. 75 (1914), both the railroad and telegraph acts of 1866 were cited. The Court held invalid the judgment of a Kansas court ordering the railroad to remove certain bridges, saying pp. 78-79:

"The freedom from interference on the part of the states is not confined to a simple prohibition of laws impairing it, but extends to interference by any ultimate organ. It was held that under the permissive statute authorizing telegraph companies to maintain lines on the post roads of the United States a state could not stop the operation of the lines by an injunction for failure to pay taxes. *Western U. Teleg. Co. v. Atty. Gen.*, 125 U.S. 530; *Williams v. Talladega*, 226 U.S. 404, 415, 416. It would seem that the same principle applies to railroads under the commerce clause of the Constitution, especially if taken in connection with the somewhat similar statute now Rev. Stat. § 5258, U.S. Comp. Stat. 1901, p. 3565 [45 U.S.C. § 84]

"The decisions also show that a state cannot avoid the operation of this rule by simply invoking the convenient apologetics of the police power. It repeatedly has been said or implied that a direct interference with commerce among the states could not be justified in this way. * * *

GIBBONS V. OGDEN

The instant case affords a perfect example for the application of *Gibbons v. Ogden*, 9 Wheaton 1 (1824). There the New York legislature did not object to steamboats on the Hudson; instead it welcomed them, but only if they were operated under the license granted by the legislature to Fulton and Livingston and their successors. The Court held that the New York act was superseded by the federal coasting license act, 1 Stat. 305, 46 U.S.C. §§ 251 *et seq.*

Here the Chicago City Council does not object to the operation of the interstation transfer vehicles; instead it welcomes them, but only if they are operated under the licenses granted by the Council to Parmelee. Anyone else who wants to operate transfer vehicles in interstate commerce must go to the Council, via the license commissioner, and obtain the passage of an ordinance granting such authority (R. 44-45). Plainly, the ordinance is superseded by the Interstate Commerce Act and the railroad interchange act of 1866. It would be impossible for the railroads to assume their duties under those acts and at the same time yield to § 28-31.1 of the Chicago ordinance.

Moreover, one purpose of the railroad communication act of 1866 was to make the principle of *Gibbons v. Ogden* applicable to railroads. See pp. 28-29 above.

In *Harmon v. Chicago*, 147 U.S. 396 (1893), the Court held a Chicago ordinance invalid under the rule of *Gibbons v. Ogden*, *supra*, 9 Wheaton 1: The ordinance "exact[ed] a license * * * for the privilege of navigating the Chicago river and its branches by tug boats." The tugs had federal coasting licenses. Citing *Gibbons v. Ogden*, the Court said, pp. 406-407:

"* * * The requirement that every steam tug, barge, or towboat, towing vessels or craft for hire in the Chi-

cago river or its branches shall have a license from the City of Chicago, is equivalent to declaring that such vessels shall not enjoy the privileges conferred by the United States, except upon the conditions imposed by the city. This ordinance is, therefore, plainly and palpably in conflict with the exclusive power of Congress to regulate commerce, interstate and foreign. * * *"

CASTLE V. HAYES FREIGHT LINES

Castle v. Hayes Freight Lines; 348 U.S. 61 (1954) has roots running directly to the railroad and telegraph acts of 1866 and to the decisions construing them. The *Hayes* case held invalid an Illinois statute authorizing state officials to forbid a motor carrier to operate on the state's highways for a fixed period as a penalty for habitual violation of state laws regulating the maximum weight of trucks. The Court said, pp. 63-64, that since Congress had vested the Interstate Commerce Commission with power to suspend or revoke motor carrier certificates:

"* * * it would be odd if a state could take action amounting to a suspension or revocation of an interstate carrier's commission-granted right to operate. Cf. *Hill v. Florida*, 325 U.S. 538."

Hill v. Florida, 325 U.S. 538 (1945), cited in the foregoing excerpt, held invalid a Florida statute which forbade anyone to act as representative of a labor organization unless licensed as such by the state. The Court held that this requirement was invalid because in conflict with the provision of the National Labor Relations Act giving employees freedom to choose their own representative, saying p. 543:

"It is the sanction here imposed * * * which brings about a situation inconsistent with the federally protected process of collective bargaining. Cf. *Western Union Telegraph Co. v. Atty. Gen.*, 125 U.S. 530, 553,

554; *Kansas City Southern R. Co. v. Kaw Valley Drainage Dist.*, 233 U.S. 75, 78; *St. Louis Southwestern R. Co. v. Arkansas*, 235 U.S. 350, 368."

The federal statutes that authorize and compel the railroads to perform the interstation transfer service have superseded power at least equal in force to the federal acts given effect in *Gibbons v. Ogden*, 9 Wheaton 1; *Pensacola Telegraph Co. v. Western Union Telegraph Co.*, 96 U.S. 1; and *Castle v. Hayes Freight Lines*, 348 U.S. 61. Any interruption of the transfer service would collide with the duty of the railroads to perform it under their tariffs, and with the power of the Interstate Commerce Commission to compel it.

WHO SHALL CONDUCT INTERSTATE COMMERCE

It is to be noted that the exercise of state power which the Court has forbidden in these leading cases is the power to say *who* shall engage in federally authorized interstate commerce. In these cases the states did not object to or attempt to stop steamboat traffic, telegraph lines, truck lines, or union business agents; they only wanted to say *who* should conduct these activities. But the Court held that the exercise of state power to decide *who* should conduct the operation was just as much of an obstruction to the commerce as an outright stoppage of it would be. Exactly the same principle is applicable here.

PARMELEE'S AUTHORITIES

As heretofore noted, pp. 16-17, the cases cited by Parmelee, pp. 27-40, have no relevancy to the issue here, which is whether the City can regulate in the fashion provided by § 28-31.1 of Chapter 28, the interstation transfer service subject to 49 U.S.C. § 302(c)(2). *Columbia Terminals v. Lambert*, D.C. Mo., 30 F. Supp. 28 (1939), aff. 309 U.S. 620, was decided before the enactment of § 302(c)(2), Sept. 18,

1940, 54 Stat. 920; and in any event that case is clearly against Parmelee insofar as it reached the issue here involved. See the Opinion of the Court of Appeals (R. 211 footnote 26).

The authorities on which Parmelee relies do not include any cases posing the issue whether state authorities can require proof of public convenience and necessity as a condition to providing interstate service. The Court clearly pointed out in *Fry Roofing Co. v. Wood*, 344 U.S. 157 (1952), heavily relied upon by Parmelee, that Arkansas had no right to require proof of public convenience and necessity or to exercise any other form of discretionary licensing power even though the motor carrier had no federal authority. In the instant case the only power that the City could possibly exercise under § 28-31.1 is the power to determine public convenience and necessity because that is the only form of power contained in that section. In the *Fry* case the Court concluded its opinion by defining precisely the issue decided, as follows, p. 163:

“* * * we hold only that Arkansas is not powerless to require interstate motor carriers to identify themselves as users of that state's highways.”

In the instant case the City has precisely that power of identification by license by force of §§ 28-5, 28-6, 28-10, and 28-11 of Chapter 28 (R. 174, 177), and no one is disputing that power. What appellees-respondents are contesting here, and what the Court of Appeals held invalid (R. 208), is precisely the power which Arkansas lacked and which the Court in the *Fry* case plainly said would be in excess of the state's power.

Every state act that has come before the Court where proof of public convenience and necessity was required before conducting interstate transportation, as by § 28-31.1

of Chapter 28, or where some equivalent economic test was required, or where any discretionary licensing power over interstate commerce was asserted, has been held invalid even in the absence of federal occupancy of the field. *Buck v. Kuykendall*, 267 U.S. 307, 315-316 (1925); *Bush v. Maloy*, 267 U.S. 317, 324-325 (1925); *St. Clair County v. Interstate Sand & Car Transfer Co.*, 192 U.S. 454, 469 (1904); *Sault Ste. Marie v. International Transit Co.*, 234 U.S. 333, 340 (1914); *Vidalia v. McNeely*, 274 U.S. 676, 683 (1927); *Michigan Public Utilities Comm. v. Duke*, 266 U.S. 570, 576-577 (1925); *Toomer v. Witsell*, 334 U.S. 385, 403-404, 406 (1948).

14.

ANSWER TO PARMELEE'S PARTS IV AND V

Section 28-31.1 of Chapter 28 is invalid on its face as applied to the interstate commerce here involved. It is all one piece and the railroads could not be required to comply with it under any possible assumptions.

Parmelee says, p. 40, that "the Court of Appeals erred in presuming that the ordinance would be unconstitutionally applied." A reading of §28-31.1 of Chapter 28, p. 7, above, shows at once that it could not possibly be applied in any manner or degree to the interstate transportation here involved under 49 U.S.C. § 302(c)(2) except in an unconstitutional manner. The very first step required, an application to the vehicle license commissioner for the opportunity to prove that public convenience and necessity requires the interstate commerce here involved, is *per se* an unconstitutional demand that cannot be required. *Smith v. Cañoon*, 283 U.S. 553, 562 (1931); *Michigan Public Utilities Comm. v. Duke*, 266 U.S. 570, 575 (1925); *Lovell v. Griffin*, 303 U.S. 444, 453 (1938); *Toomer v. Witsell*, 334 U.S. 385, 403-404 (1948).

Parmelee makes an argument, which, to the best of our understanding, is that maybe § 28-31.I would not be applied in an unconstitutional manner. But how under its terms could it possibly be applied otherwise, when the first step must be an application for the privilege of proving public convenience and necessity for the right to conduct interstate commerce by railroad under 49 U.S.C. 302(c)(2)? As the Court said in *Kansas City Southern Railway Co. v. Kaw Valley Drainage District*, 233 U.S. 75, 78, *supra*, ordinances of this character "must be taken as they read on their face. * * * They cannot be qualified by speculation as to what is likely to happen in fact."

In *Smith v. Cahoon*, 283 U.S. 553, *supra*, the argument was made by the state, similar in effect to Parmelee's argument here, that the carrier ought to be required to apply for a license under a statute requiring proof of public convenience and necessity, and then see what would happen. The Court rejected this argument, pointing out that either the statute was void on its face because it required proof of public convenience and necessity, or that it was void because it lacked any other criteria for official action after the public convenience and necessity requirement was ignored or deleted. The Court said, p. 564:

* * * Either the statute imposed upon the appellant obligations to which the state had no constitutional authority to subject him, or it failed to define such obligations as the state had the right to impose with the fair degree of certainty which is required of criminal statutes.

Similarly, in the instant case, the only criterion for action by the Commissioner and by the Council is proof of public convenience and necessity, a requirement that cannot be applied to interstate commerce; and the theory that some other standard would be applied by the Commissioner and

the Council is wholly untenable where there are no provisions in the section upon which any other criteria could be based.

← The foregoing considerations apply to Parmelee's argument, pp. 44-45, that the railroads should be required to "exhaust their administrative remedies." What "administrative remedies" is Parmelee talking about? The only one provided by § 28-31.1 is to apply for a certificate of public convenience and necessity to conduct interstate commerce, and that cannot be required, as pointed out above.

The argument is made, pp. 41-42, that the phrase "public convenience and necessity" in § 28-31.1 may be construed to include some lesser criterion than transportation economics; and, so the argument runs, therefore be held valid. It is suggested that the phrase may permit withholding of authority "on grounds relating to the valid exercise of the police power." There are several obvious answers to that.

The Supreme Court of Illinois and this Court have uniformly held that the phrase "public convenience and necessity" includes only the economic regulation of transportation and not any elements of the police power. In *Egyptian Transportation System v. Louisville and Nashville R. Co.*, 321 Ill. 580, 587-588, 152 N.E. 510, 512-513 (1926), the Court said:

"To authorize an order of the Commerce Commission granting a certificate of convenience and necessity to one carrier though another is in the field it is necessary that it appear first that the existing utility is not rendering adequate service. (*West Suburban Transportation Co. v. Chicago and West Towns Railway Co.*, 309 Ill. 87.) The method of regulation of public utilities now in force in Illinois is based on the theory of a regulated monopoly rather than competition, and before

one utility is permitted to take the business of another already in the field it is but a matter of fairness and justice that it be shown that the new utility is in a position to render better service to the public than the one already in the field. (*Chicago Motor Bus Co. v. Chicago Stage Co.*, 287 Ill. 320.) It is in accord with justice and sound business economy that the utility already in the field be given an opportunity to furnish the required service."

In *The Commerce Commission v. Chicago Railways Company*, 362 Ill. 559, 566, 1 N.E. 2d 65, 68-69 (1936), the Court said:

"Before the enactment of the Public Utilities Act such highways and streets were open to competition by any company which sought to carry passengers, provided it had the proper highway consent. The purpose of the Utilities act was to control this competition so that such service would not be destroyed because of ruinous competition but would be protected under proper regulation."

In *Schiller Piano Co. v. Illinois Northern Utilities Co.*, 288 Ill. 580, 585-586, 123 N.E. 631, 633 (1919), the Court said:

"The Public Utilities act of this State has no relation to the public health, safety or morals, but was enacted to protect the public against unreasonable charges and discrimination and to promote the general welfare."

In many other cases the Illinois Court has held without exception that the phrase "public convenience and necessity" in the Illinois Public Utilities Act, Ill. Rev. Stat., 1955; Bar Assn. Ed., Ch. 111½, § 56, set out in part in appendix hereto, relates only to economic regulation of competition, monopoly, rates, services, and other economic

factors, and does not embrace any elements of police power regulation.³

Section 28-31.1 was copied bodily from § 28-22.1 of Chapter 28 which regulates taxicabs (R. 183-184). This section was construed by the Supreme Court of Illinois in 1947 to be a measure for the economic regulation of the taxicab business, a means of limiting the number of cabs for the purpose of limiting competition, and was held valid. *Yellow Cab Co. v. City of Chicago*, 396 Ill. 388, 71 N.E. 2d 652. While Illinois has that power in respect to intrastate commerce by taxicab it has no such power in respect to interstate commerce.

In *Interstate Commerce Commission v. Parker*, 326 U.S. 60 (1945), the Court was called upon for construction and application of the phrase "public convenience and necessity" in the Interstate Commerce Act. The Court said *inter alia*, p. 69:

"Public convenience and necessity should be interpreted so as to secure for the Nation the broad aims of the Interstate Commerce Act of 1940." (citing cases).

The Act of 1940 created 49 U.S.C. § 302(c), 54 Stat. 920. Obviously the "broad aims" of that act cannot be realized if the City of Chicago is to be permitted to set its own standards of public convenience and necessity for interstate commerce which is performed pursuant to § 302(c).

However, the short and immediately dispositive answer is that the interstate transportation here involved could

³ *Eagle Bus Lines, Inc. v. Illinois Commerce Commission*, 3 Ill. 2d 66, 119 N.E. 2d 915 (1954); *Chicago & West Towns Railways, Inc. v. Illinois Commerce Commission*, 383 Ill. 20, 43 N.E. 2d 320 (1943); *Bartonville Bus Line v. Eagle Motor Coach Line*, 326 Ill. 200, 157 N.E. 175 (1927); *Illinois Power & Light Corp. v. Commerce Commission*, 320 Ill. 427, 151 N.E. 326 (1926).

not be barred for any reason, particularly where the transportation is not considered objectionable and denials would be made only on a selective basis. *Castle v. Hayes Freight Lines*, 348 U.S. 61 (1954); *Gibbons v. Ogden*, 9 Wheaton 1 (1824); *Pensacola Telegraph Co. v. Western Union Telegraph Co.*, 96 U.S. 1 (1878).

5.

ANSWER TO PARMELEE'S PART VI

If § 28-31.1 is taken at face value it is invalid on its face. Parmelee's attempts to construe it to mean something else than what it says on its face, in an attempt to save it, affords occasion for proper resort to legislative history.

Parmelee argues, pp. 48-49, that the Court's resort to legislative history was improper. The cases Parmelee cites, pp. 49-51, are not apposite to this contention, and are not relevant to any issue here. The reason for this resort to legislative history is plainly stated by the Court, and appears again in Parmelee's brief here. Parmelee urged in the Court of Appeals (R. 208), and argues here, pp. 40-44, that the plain words of § 28-31.1 should be construed to mean something else than what they say. It actually does not matter what that something else is, since Parmelee's conception of it in any event is the power to select the agency to perform interstate commerce, a power which the City lacks. But to show the basic fallacy of Parmelee's contention the Court cited (R. 208) the legislative history (R. 90-96) which shows that the Council Committee was interested only in guarding Parmelee from new competition in interstate commerce and was not interested in any valid police power considerations.

The materials of legislative history were official documents of the City (R. 93-96), and a reporter's transcript

of the first meeting of the Committee (R. 90-93). The truth and accuracy of these documents have never been questioned. They may properly be considered. *United States v. International Union U.A.W.*, 352 U.S. 567, 570 (1957); *Western Sand & Gravel Corp. v. Town of Cornwall*, 2 Ill. 2d 560, 564, 119 N.E. 2d 261, 264 (1954).

The principle of resort to legislative history is too well understood to require argument. *United States v. International Union*, *supra*. It is established in the law of Illinois. In *City of Rockford v. Schultz*, 296 Ill. 254, 257, 129 N.E. 865, 866 (1921) the Court said, in words closely applicable to the instant case:

"The object in construing a statute is to ascertain and give effect to the legislative intent, and to that end the whole act, the law existing prior to its passage, any changes in the law made by the act, and the *apparent motive for making such changes*, will be weighed and considered." (Emphasis added.)

There the Supreme Court of Illinois resorted to the report of a special committee of the legislature to ascertain "the apparent motive" in amending a statute.

In *Dean Milk Co. v. Chicago*, 385 Ill. 565, 570, 33 N.E. 2d 612, 615 (1944), the Court said:

"The Rules for the construction of an ordinance are the same as those applied in the construction of a statute."

The Court there considered a large amount of extrinsic legislative history and testimony of expert witnesses to determine the meaning of the ordinance, citing the foregoing as justification for such procedure.

In *People v. Olympic Hotel Bldg. Corp.*, 405 Ill. 440, 445, 91 N.E. 2d 597, 600 (1950), the Court said:

"Resort to explanatory legislative history has been declared not to be forbidden no matter how clear the words may first appear on superficial examination. (*Harrison v. Northern Trust Co.*, 317 U.S. 476.)"

In the case cited in the foregoing excerpt this Court made the statement attributed to it in consulting the report of a committee.

In *Bashuizen v. Thompson & Taylor Co.*, 360 Ill. 160, 163, 195 N.E. 625, 626. (1935), the Court said:

"For the purpose of passing upon the construction, validity or constitutionality of a statute the court may resort to public official documents, public records, both State and national, and may take judicial notice of and consider the history of the legislation and the surrounding facts and circumstances in connection therewith."

It is entirely clear that the Court of Appeals reached the conclusion that § 28-31.1 is invalid on its face under the Commerce Clause without taking the legislative history into consideration (R. 205-208). The Court did not resort to legislative history as a basis for concluding that § 28-31.1 is invalid, but only to answer an argument of Parmelee and the City to the effect that the section should be given a meaning differing from its plain terms. Thus the legislative history at the most hardly rises to the dignity of cumulative evidence on this issue, and clearly had no effect upon the Court's conclusions in reaching its decision that the section is invalid.

THE LEGISLATIVE HISTORY IS TOO PATENT IN THE FRAMEWORK OF THIS CASE TO BE OVERLOOKED

Independently of the foregoing however, the legislative history of § 28-31.1 of Chapter 28 is just too patent and too pervading in the framework of this case to be overlooked.

The progression of events reveals an impressively purposeful, and temporarily successful, course of action that cannot be ignored.

The most superficial glimpse of these events is fully revealing. For some years Chapter 28 of the Chicago Municipal Code had regulated *inter-alia* "terminal vehicles" (R. 171-189). These were defined (R. 172) as a "public passenger vehicle which is operated under contracts with railroad and steamship companies, exclusively for the transfer of passengers from terminal stations." Parmelee had the only contract. On June 13, 1955, the railroads announced that they were discontinuing their relations with Parmelee and had arranged with Transfer to perform the service beginning October 1, 1955 (R. 82). On July 26, 1955, the Council passed the 1955 amendment to Chapter 28 (R. 44-45).

New § 28-31.1 gave to the City Council the right to determine by ordinance whether anyone other than Parmelee may engage in interstate commerce by terminal vehicle. And the sole criterion for Council action is the economic concept of "public convenience and necessity."

These public events, occurring between June 13 and July 26, 1955, could mean only that the City and Parmelee were trying to perpetuate Parmelee as the transfer agent of the railroads and to prevent Transfer from performing the service. And the City and Parmelee never made any secret of the fact that such was their purpose. They stoutly defended § 28-31.1 in the District Court and filed a joint brief in the Court of Appeals, insisting that § 28-31.1 was applicable to respondents' transfer service and was valid and that they intended to enforce § 28-31.1 against the railroads and Transfer. They are making the same contentions here.

These public events clearly reveal the City's and Parmelee's purpose without resort to the proceedings of the Council Committee on Local Transportation. But any interested person looking at the Council proceedings (R. 44) could not fail to notice reference to the Committee's report. From there it is most natural to go to the official records of the Committee's proceedings (R. 93-96). Assuredly one is not compelled to be so blind or naive as not to notice these interesting official records which so clearly corroborate the plain meaning of the public events leading to the enactment of § 28-31.1.

6.

ANSWER TO PARMELEE'S PART VII

Parmelee's part VII argument apparently assumes that the Court of Appeals held all of Chapter 28 invalid, and the argument is thus without foundation. But if Parmelee means by "sanctions" the power to determine who shall engage in interstate commerce, then the argument is doubly erroneous.

We have pointed out above, p. 5, that the Court of Appeals held only § 28-31.1 (R. 44-45) invalid (R. 208) and held the rest of Chapter 28 (R. 171-189) valid and applicable (R. 208-209, 200). There thus remain in Chapter 28 licensing provisions as comprehensive as legitimate exercise of the police power can permit.

Hence there is no basis for Parmelee's argument that the Court's judgment deprived the City of any lawful or needed licensing power.

Parmelee's argument comes down to saying that in addition to all of the rest of the ordinance the City ought to have § 28-31.1. That argument is fully met in our part 3 above, p. 15.

CONCLUSION

The Court should hold that appellant-petitioner does not have standing to seek review on appeal or by writ of certiorari, or should affirm the judgment of the Court of Appeals.

Respectfully submitted,

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APPENDIX

38TH CONGRESS,
1st Session.

HOUSE OF REPRESENTATIVES

REPORT
No. 31.

DELAWARE AND RARITAN BAY RAILROAD
COMPANY.

[To accompany bill H. R. No. 307.]

MARCH 9, 1864.—Ordered to be printed.

MR. DEMING, from the Committee on Military Affairs,
made the following

REPORT.

*The Committee on Military Affairs, to whom was referred
the petition of the Raritan and Delaware Bay
Railroad Company, respectfully report:*

The petitioners pray that their roads and the boats connected with them may be declared post and military roads of the United States.

The committee find that the petitioners have completed a road of sixty-five miles in length, from Port Monmouth, near Sandy Hook, to Atsion, nearly east of the city of Philadelphia; and that they also have the control of the Camden and Atlantic Railroad Company; and that the two roads are connected by the Botsto branch of the Camden and Atlantic Railroad Company; and that by means of these roads and boats on Raritan bay and the Delaware river, a continuous through line is constituted between the cities of New York and Philadelphia.

The committee find that since the petition was brought before this committee the chancellor of New Jersey, at the suit of the Camden and Amboy Railroad Company, has enjoined the use of the petitioners' roads, except for local purposes, and has ordered that the Raritan and Delaware Bay Railroad Company pay to the Camden and Amboy Railroad Company all sums collected by the former for through business, including the amount received for transportation of troops; and that the chancellor decreed that the petitioners' road had no right to carry or aid in carrying passengers and freight between New York and Philadelphia.

The committee find that the act of the State of New Jersey, by authority of which the petitioners have been enjoined from carrying on their roads passengers and freights between New York and Philadelphia, is as follows: "That it shall not be lawful, at any time during the said railroad charter, (to wit, the Camden and Amboy,) to construct any other railroads in this State without the consent of the said companies, which shall be intended or used for the transportation of passengers or merchandise between the cities of New York and Philadelphia, or to compete in business with the railroad authorized by the act to which this supplement is relative."—(New Jersey Session Laws for 1854, p. 387.)

The committee find that from the 1st of September, 1862, to the 1st of June, 1863, there were transported from New York to Philadelphia, over the petitioners' road, 17,428 men, 649 horses, and 806,245 pounds of freight, under the orders of the government.

The committee find that Congress has five times exercised the power of establishing post roads. The first case in which it was exercised is to be found in volume 10 United States

Statutes at Large, page 112, where, in sections 6 and 8 of an act making appropriations for the Post Office Department, it is enacted that the bridges across the Ohio river at Wheeling, in the State of Virginia, and at Bridgeport, in the State of Ohio, abutting on Jane's island, in said river, are hereby declared to be lawful structures in their present position and elevation, and shall so be held and taken to be, anything in any law or laws of the United States to the contrary notwithstanding; and that said bridges are declared to be, and are, established *post roads for the passage of the mails* of the United States.

The second instance in which Congress exercised the power is to be found in "An act to establish certain post routes, and to discontinue others, (5 U. S. Statutes at Large, p. 271,) where, in section 2, it is provided that each and every railroad within the limits of the United States which now is, or hereafter may be, made and completed, shall be a post route, and the Postmaster General shall cause the mail to be transported thereon.

The third instance is in "An act to establish certain post roads," approved March 3, 1853, (U. S. Statutes at Large,) where the same legislation is reaffirmed; and it is again enacted in section 3 of said act, "that all railroads which now, or hereafter may be, in operation, be, and the same are hereby, declared to be post roads."

The fourth instance in which Congress exercised the right is found in volume 12, U. S. Statutes at Large, pp. 569, 570, where, in "An act to establish certain post roads," in sections 1 and 2, it is enacted "that the bridge partly constructed across the Ohio river, at Steubenville, in the State of Ohio, abutting on the Virginia shore of said river, is hereby declared to be a *lawful structure*."

"That the said bridge and Holliday's Cove railroad are hereby declared a public highway and established a *post road*, for the purpose of transmission of mails of the United States, and that the Steubenville and Indiana Railroad Company, chartered by the legislature of the State of Ohio, and the Holliday's Cove Railroad Company, chartered by the State of Virginia, or either of them, are authorized to complete, maintain, and operate said road and bridge when completed, as set forth in the preceding section, anything in the law or laws of the above-named States to the contrary notwithstanding."

The fifth congressional precedent is to be found in volume 12, U. S. Statutes at Large, p. 334. In "An act to authorize the President of the United States in certain cases to take possession of railroad and telegraph lines, and for other purposes," approved January 31, 1863, it is enacted that "the President of the United States, when in his judgment the public safety may require it, be, and he is hereby, authorized to take possession of any or all the railroad lines of the United States, so that they shall be considered *post roads, and part of the military establishment* of the United States."

Your committee find that the Supreme Court has affirmed the constitutionality of the act of Congress in reference to the Wheeling bridge. In 12th Howard, 528, the Supreme Court, after the passage of the act in question, denied a motion to punish the owners of the bridge for a contempt in rebuilding it, and affirm in the following words, "that the act declaring the Wheeling bridge a lawful structure was within the legitimate exercise by Congress of its constitutional power to regulate commerce."

In addition to the well-established power of Congress to establish post roads, the committee believe that its power

to regulate commerce confers upon it ample authority to grant the petitioners' prayer, and to relieve them from the embarrassments created by the narrow and obnoxious legislation of New Jersey.

Article 1, section 8, of the Constitution of the United States provides that Congress "shall have power to regulate commerce with foreign nations, *and among the several States*, and with the Indian tribes."

This power has been held to be exclusive in Congress, and that it cannot be abridged or impaired by State legislation.—(*Gibbons vs. Ogden*, 9 Wheatons.)

When the State of New York undertook to restrict navigation by local law, in granting to Livingston & Fulton an exclusive right to navigate the waters of New York with vessels propelled by steam, the Supreme Court of the United States, through Chief Justice Marshall, declared the restriction to be illegal, because it interfered with commerce between the States, and, in his opinion, he raised the intention of the Constitution above the narrow interpretation of the word "*commerce*," which would confine it to the transportation of property, and declared it embraced all inter-State communications, and the whole subject of intercourse between the people of the several States; thus ascribing to Congress the power to regulate the transit both of persons and property through and across contiguous or intervening States. In this case Chief Justice Marshall says:

"But in regulating commerce with foreign nations, the power of Congress does not stop at the jurisdictional lines of the several States. It would be a very useless power if it could not pass these lines. The commerce of the United States with foreign nations is that of the whole United

States. Every district has a right to participate in it. The deep streams which penetrate our country in every direction pass through the interior of almost every State in the Union, and furnish the means for exercising this right. If Congress has the power to regulate it, that power must be exercised wherever the subject exists. If it exists within the States, if a foreign voyage may commence or terminate at a port within a State, then the power of Congress may be exercised within a State."

In the case of the State of Pennsylvania *vs.* The Wheeling and Belmont Bridge Company, 18 Howard, 421, the State of Pennsylvania claimed the right to limit and control the means of transit across the Ohio river to the State of Ohio upon grounds of State interest, which were sustained by the Supreme Court so long as Congress refrained from legislation upon the same subject. By the law of Pennsylvania these bridges were condemned as nuisances, and the Supreme Court affirmed the condemnation. But the public demand for the increased commercial facilities afforded by these condemned structures claimed and received the attention of Congress, and, under its unquestioned power to regulate commerce and to establish post roads, it enacted in respect to each of these bridges that they were and should continue to be lawful structures, anything in any State law to the contrary notwithstanding. The Supreme Court sustained the action of Congress, as legalizing by its paramount authority the structures with the State sovereignty condemned, and they are now established as permanent post routes.

The argument by which the power of Congress to interpose in this and similar cases, when the general interests of commerce are embarrassed and impaired by local State legislation, is set forth with great clearness and force in

the opinion of the Supreme Court, delivered by Justice Nelson, in the case just cited. It concedes the right of State sovereignty within its own limits, and by its own legislative acts or compacts, to restrict or to encourage the enterprise of its own citizens, in the use of its own territory. But all such legislation is subject and subordinate to the constitutional power of Congress to regulate commerce among the States, and whenever that is exercised the local State laws and compacts must give way. If this were not so, the constitutional grant of the power would be a vain thing.

In the passenger cases, 18 Howard, 283, the Supreme Court holds that the statutes of New York and Massachusetts, imposing taxes upon alien passengers arriving at the ports of those States, was in derogation of the article of the Constitution which gives power to Congress to regulate commerce with foreign nations and among the States, and therefore unconstitutional and void.

In expressing the opinion of the Court, Judge McLean says, page 400: "Shall passengers, admitted by act of Congress without a tax, be taxed by a State? The supposition of such a power in a State is utterly inconsistent with a commercial power, either paramount or exclusive, in Congress."

Judge Grier says, page 462: "To what purpose commit to Congress the power of regulating our intercourse with foreign nations and among the States, if these regulations may be changed at the discretion of each State? And to what weight is that argument entitled which assumes that because it is the policy of Congress to leave this intercourse free, therefore it has not been regulated, and each State may put as many restrictions upon it as she pleases?"

It clearly appears, from the various opinions given in these celebrated cases, that the power to regulate commerce is absolutely exclusive in Congress, so that no State can

constitutionally enact laws or any regulation of commerce between the States, whether Congress has exercised the same power in question or left it free.

The inference from the various cases cited is, that New Jersey, by the law above quoted, and by virtue of which she is attempting to destroy the franchises of the petitioners, has usurped the jurisdiction of Congress, and that we are authorized to interfere to prevent that usurpation from abridging one of the means of communication between New York and Philadelphia.

The committee find, therefore, that Congress has, in these cases, exercised the power which the petitioners ask may be interposed in their behalf, and that, both under the clause of the Constitution which authorizes it to establish post offices and post roads, and under the clause which authorizes it to regulate commerce, it has the clear right to grant petitioners the relief for which they pray. The committee find, moreover, that the State of New Jersey has, by her own legislative action, impliedly admitted the right of Congress to establish a railroad between New York and Philadelphia. By the sixth section of an act relating to the Camden and Amboy Railroad and Transportation Company, it is declared that when any other railroad or roads for the transportation of passengers and property between New York and Philadelphia, across this State, shall be constructed and used for that purpose, under or by virtue of any law of this State or *the United States authorizing or recognizing said road*, that then, and in that case, the said dividends shall no longer be payable to the State, and the said stock shall be retransferred to the company by the treasurer of this State.

The committee come now to consider the question whether the present application presents a proper case for the exer-

cise of the powers which it has already been shown Congress possesses. In answering this question it should be borne in mind that the exercise of this power is invoked, not only by the petitioners, but also by the government, and by the travelling and trading community, who now earnestly seek new channels of communication between New York and Washington. It appears by a letter addressed by General Meigs to the special committee investigating the propriety of establishing a new railroad between here and New York, that the government requires not only all the available means, but additional facilities, for the transportation of troops and munitions of war over the line which is partly covered by the roads of the petitioners, and that it has more than once been constrained to relieve the existing lines by water conveyance of troops to the capital. It also appears that during the recent freezing of the Potomac, the insufficiency of our means of transportation for military purposes was painfully apparent, and I have already stated that on one memorable occasion, when great promptness and great exertions were required, the petitioners greatly aided the government in the conveyance of troops and warlike material to the seat of war; and their reward has been an injunction from through transportation, and an order to account to the Camden and Amboy company for the money which they received for this service. No matter how urgent the emergency; no matter how imperative the demand of the army for re-enforcements, the roads of the petitioners are now closed, not only against the government, but against the citizens of every State; and troops, munitions of war, and travellers, are only permitted to pass from New York to Philadelphia over the roads of the monopoly. The quartermaster's department of the city of New York a few days ago applied to the petitioners to transport a regiment to Philadelphia, and the application was denied, because

such transportation had been enjoined by the chancellor of New Jersey.

In this connexion it is worthy of remark that since the injunction the rates of traffic upon the Camden and Amboy railroad have been unexpectedly and suddenly advanced.

The fact that additional accommodations for trade and travel between New York and Philadelphia is demanded as well by the government as for public convenience, is supported by the action of Congress and of the legislatures of the States.

On the 12th of the present month a resolution was passed by the House of Representatives which declares in its preamble "that the facilities for convenient and expeditious travel and transportation of troops between the cities of New York and Washington, especially between New York and Philadelphia, are at present notoriously inconvenient and inadequate."

Congress has also been officially informed that the legislatures of the States of Maine and New York have requested their representatives and instructed their senators to urge upon us the necessity for increasing the facilities for convenient and expeditious travel between the cities of New York and Philadelphia, and which, in the language of the resolutions, are stated to be "at present notoriously inconvenient and inadequate."

It has never been claimed that any State has the right to inhibit the transit across its territory of passengers and merchandise. The committee are unable to appreciate any distinction between a total inhibition of transit and the permission to use only a specified route, whose limited means virtually amount at least to a partial, if not a total, prohibition. Both the government and the public require con-

stant and prompt means of communication, and anything which prevents this is a prohibition which ought not to be tolerated.

Under the facts already stated, the question presented by the applicants resolves itself into this: Is it expedient for Congress to authorize a road which was legally constructed under proper State authority, and which has a legal right to transport passengers and merchandise from the Delaware river to Raritan bay, to commence such transportation from the city of Philadelphia, on the opposite side of the Delaware, and continue it to the city of New York, on the opposite shore of the Raritan? The necessities of the government, the necessities of the public, and the absolute rights of commercial intercourse, all require that this question should be answered in the affirmative.

The Committee on Military Affairs therefore unanimously recommend the passage of the accompanying bill.

TELEGRAPH ACT OF 1866

47 U.S.C. § 1. Use of public domain. Any telegraph company organized, under the laws of any State, shall have the right to construct, maintain, and operate lines of telegraph through and over any portion of the public domain of the United States over and along any of the military or post roads of the United States which have been or may hereafter be declared such by law, and over, under, or across the navigable streams or waters of the United States; but such lines of telegraph shall be so constructed and maintained as not to obstruct the navigation of such streams and waters, or interfere with the ordinary travel on such military or post roads.

§ 2. Use of materials from public lands. Any telegraph company organized under the laws of any State shall have the right to take and use from the public lands through which its lines of telegraph may pass, the necessary stone, timber, and other materials for its posts, piers, stations, and other needful uses in the construction, maintenance, and operation of its lines of telegraph, and may preempt and use such portion of the unoccupied public lands subject to preemption through which their lines of telegraph may be located as may be necessary for their stations, not exceeding forty acres for each station; but such stations shall not be within fifteen miles of each other.

§ 3. Government priority in transmission of messages. Telegrams between the several departments of the Government and their officers and agents, in their transmission over the lines of any telegraph company to which has been given the right of way, timber, or station lands from the public domain shall have priority over all other business, at such rates as the Postmaster General shall annually fix. And no part of any appropriation for the several departments of the Government shall be paid to any company which neglects or refuses to transmit such telegrams in accordance with the provisions of this section.

§ 4. Purchase of lines. The United States may, for postal, military, or other purposes, purchase all the telegraph lines, property, and effects of any or all companies acting under the provisions of sections 1 to 6 of this title, at an appraised value, to be ascertained by five competent, disinterested persons, two of whom shall be selected by the Postmaster General of the United States, two by the company interested, and one by the four so previously selected.

§ 5. Acceptance of obligation to be filed. Before any telegraph company shall exercise any of the powers or

privileges conferred by law such company shall file their written acceptance with the Postmaster General of the restrictions and obligations required by law.
(Act of July 24, 1866, 14 Stat. 221).

ILLINOIS REVISED STATUTES, 1955, BAR ASSN. ED.,

CHAPTER 111½

56. Certificate of convenience and necessity.]

§ 55. No public utility shall begin the construction of any new plant, equipment, property or facility which is not in substitution of any existing plant, equipment, property or facility or in extension thereof or in addition thereto, unless and until it shall have obtained from the Commission a certificate that public convenience and necessity require such construction.

No public utility not owning any city or village franchise nor engaged in performing any public service or in furnishing any product or commodity within this State and not possessing a certificate of public convenience and necessity from the State Public Utilities Commission or the Public Utilities Commission, at the time this Act goes into effect shall transact any business in this State until it shall have obtained a certificate from the Commission that public convenience and necessity require the transaction of such business.

Whenever after a hearing the Commission determines that any new construction or the transaction of any business by a public utility will promote the public convenience and is necessary thereto, it shall have the power to issue certificates of public convenience and necessity.

